Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

OKSANA OLESZKO,

Petitioner,

v.

STATE COMPENSATION INSURANCE FUND, DAVID HOWARD, AND DORA COOKE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In an employment discrimination action plaintiff Oleszko sought discovery concerning other cases of employment discrimination from her employer's employee assistance program ("EAP"). The employer objected on the ground that the information was protected by the psychotherapist-patient privilege established in *Jaffee v. Redmond*, 518 U.S. 1 (1996). No one on the staff of the EAP does psychotherapy or has a professional license of any kind. Nevertheless the lower courts found that the evidence sought was privileged. The question presented is:

Should a new evidentiary privilege be created for communications between employees and unlicensed employee assistance program counselors, who do not do psychotherapy, when the communications are not in the course of diagnosis or treatment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The Ninth Circuit's Opinion Directly Conflicts with this Court's Opinion in *Jaffee v. Redmond* 5

II. The Ninth Circuit's Opinion Violates F.R.E. 501 as Interpreted in *Jaffee v. Redmond* Because the Federal Courts and the Overwhelming Majority of the States Have Not Recognized an EAP Privilege 6

III. The Ninth Circuit's Opinion Conflicts with the Eighth Circuit's Opinion in *Carman v. McDonnell Douglas* 9

IV. The Ninth Circuit's Opinion Violates Fundamental Policies of this Court and of American Jurisprudence 10

CONCLUSION 11

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Branzburg v. Hayes, 408 U.S. 665 (1972) 11

Carman v. McDonnell Douglas, 114 F.3d 790 (8th Cir. 1997) 4, 9, 10

Couch v. United States, 409 U.S. 322 (1973) 11

Greet v. Zagrocki, 1996 WL 724933 (E.D. Pa. 1996) 7

Jaffee v. Redmond, 518 U.S. 1 (1996) ..... *passim*

Lara v. City of Albuquerque, 971 P.2d 846 (N.M.App. 1998) 8

McMann v. Securities & Exch. Comm'n, 87 F.2d 377 (2d Cir. 1937) 4

Oleszko v. State Compensation Insurance Fund, 243 F.3d 1154 (9th Cir. 2001) 3, 7

Trammel v. United States, 445 U.S. 40 (1980) 10, 11

U.S. v. Arthur Young & Co., 465 U.S. 805 (1984) 11

U.S. v. Gillock, 445 U.S. 360 (1980) 11

U.S. v. Lowe, 948 F.Supp. 97 (D.Mass. 1996) 7

U.S. v. Nixon, 418 U.S. 683 (1974) 6, 11

University of Pa. v. EEOC, 493 U.S. 182 (1990) 5, 11

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

Conn. Gen. Stat. § 52-146n 8

TABLE OF AUTHORITIES – Continued

Page

Federal Rule of Evidence 501 .....2, 5, 6, 9

Ind. Code. Ann. § 25-40-1-5..... 8

Ind. Code. Ann. § 25-40-2-1..... 8

Ind. Code Ann. § 25-40-2-2 8

N.H. Rev. Code Ann. § 21-I:52-a 8

Or. Rev. Stat. § 181.860 8

R.I. Gen. Laws § 28-6.8-1 8

Supreme Court Rule 13.1 1

Supreme Court Rule 13.3 1

Tenn. Code Ann. § 62-42-115..... 9

Title VII of the Civil Rights of 1964, as amended, 42 U.S.C. § 2000e et seq..... 2

TREATISES

Weinstein's Federal Evidence, 2nd ed 8

Wigmore, Evidence, McNaughton rev., 1961 10

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion affirming the denial of discovery is published at 243 F.3d 1154 and is reprinted in the Appendix ("App.") attached hereto at App. 1-12. The court of appeals' unpublished memorandum affirming summary judgment is attached at App. 13-15. The court of appeals' order denying rehearing is attached at App. 16. The transcript of the district court hearing on plaintiff's motion to compel discovery is attached at App. 22-31. The district court's order denying discovery is at App. 35-36. The district court's order granting summary judgment on the first cause of action is at App. 37-38. The district court's order granting summary judgment on the entire action is at App. 39-53.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on March 20, 2001, and denied the timely petition for rehearing and rehearing en banc on May 3, 2001. Pursuant to Supreme Court Rules 13.1 and 13.3 this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT OF THE CASE

This is an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

Plaintiff Oksana Oleszko was and is an employee of defendant State Compensation Insurance Fund ("SCIF"). Defendants David Howard and Dora Cooke were two of her supervisors. She alleges sexual harassment, race and national origin discrimination and retaliation for participating in an investigation of sexual harassment.

In the course of this case Oleszko sought discovery of evidence of other instances of similar retaliation and discrimination from the SCIF employee assistance program ("EAP"). The plaintiff's motion to compel that discovery was denied. Subsequently the district court granted summary judgment.

EAPs are widespread institutions. They receive a great amount of information on a wide variety of subjects. See *Oleszko v. State Compensation Insurance Fund*, 243 F.3d 1154, 1155 (9th Cir. 2001).

The EAP at SCIF assists employees with a great variety of problems including employment discrimination. The coordinator of the program testified in deposition that the EAP receives information about discrimination and employment issues and refers employees to a wide variety of resources for help. These include: "financial counselors . . . community groups . . . local agencies . . . an attorney . . . government agencies . . . union stewards . . . the Equal Employment Opportunity Affirmative action program . . . ". Excerpts of Record No. 64, 7: 26:20-28:9, attached at App. 17-21.

No one on the EAP staff engages in psychotherapy, and none of them has a professional license of any kind. When appropriate the EAP will refer an employee to a therapist or doctor, just as it refers employees to union stewards, "the Equal Employment Opportunity Affirmative action program" and many other resources that may be able to assist them.

The Ninth Circuit held that all communications with the EAP are protected from disclosure based on the psychotherapist-patient privilege recognized in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The court of appeals therefore affirmed the denial of discovery from the EAP of information concerning employment discrimination and retaliation.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has announced an unprecedented and unwarranted evidentiary privilege for communications with an Employee Assistance Program ("EAP").

The Ninth Circuit's creation of this new privilege conflicts with this court's opinion in *Jaffee v. Redmond*, 518 U.S. 1 (1996) and with the Eighth Circuit's holding in *Carman v. McDonnell Douglas*, 114 F.3d 790 (8th Cir. 1997).

The Ninth Circuit's holding involves questions of exceptional importance because it creates a new privilege that permits the suppression of a vast quantity and variety of evidence which has nothing to do with psychotherapy.

As Learned Hand wrote, "The suppression of truth is a grievous necessity at best." *McMann v. Securities & Exch. Comm'n*, 87 F.2d 377, 378 (2d Cir. 1937). Privileges are therefore construed narrowly against the parties asserting them. When this Court rejected a new privilege for academic peer review records in a Title VII action, it stressed that any claim of privilege against disclosure to persons

seeking redress of employment discrimination must be construed narrowly:

> As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest.

University of Pa. v. EEOC, 493 U.S. 182, 193 (1990).

The Ninth Circuit has mistakenly reached well beyond the narrow bounds of F.R.E. 501 and *Jaffee v. Redmond*, supra, to create a new privilege which does not exist and should not exist.

I. The Ninth Circuit's Opinion Directly Conflicts with this Court's Opinion in *Jaffee v. Redmond*

Jaffee v. Redmond, 518 U.S. 1 (1996) held that there is a privilege for confidential communications between a licensed psychotherapist, including a licensed social worker, and her patients in the course of diagnosis or treatment. 518 U.S. at 15.

The Court permitted this limited privilege for communications with licensed therapists, in the course of psychotherapy, for two reasons: (1) "the imperative need for confidence and trust" for "effective psychotherapy," 518 U.S. at 10, and (2) the "transcendent importance" of the "mental health of our citizenry," 518 U.S. at 11.

Those reasons do not apply to the SCIF EAP, or to EAPs elsewhere.

As the SCIF EAP coordinator's testimony quoted above shows, the SCIF EAP provides counseling about employment discrimination and about many other subjects, but it does not engage in psychotherapy.

Indeed nothing in the record of this case, or in the literature cited by the Ninth Circuit, shows that the counseling provided to employees by the SCIF EAP or other EAPs is critically dependant on confidentiality in any way analogous to psychotherapy, or that EAP counseling is of "transcendent importance" for the nation's mental health.

The reasons for the "derogation of the search for truth," *U.S. v. Nixon*, 418 U.S. 683, 710 (1974) which justify the psychotherapist-patient privilege simply do not exist for counseling by the SCIF EAP or for EAPs in general.

II. The Ninth Circuit's Opinion Violates F.R.E. 501 as Interpreted in *Jaffee v. Redmond* Because the Federal Courts and the Overwhelming Majority of the States Have Not Recognized an EAP Privilege

Federal Rule of Evidence 501 requires that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The light of reason for a privilege limited to patients' communications with psychotherapists practicing psychotherapy was explained carefully by the Supreme Court in *Jaffee v. Redmond*, supra.

The light of experience is equally important. As *Jaffee* noted, all 50 states and the District of Columbia had

adopted some form of the psychotherapist-patient privilege, 518 U.S. at 6, 12. As the Court stated, 518 U.S. at 12-13:

> [T]he policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. . . . [T]he existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege. . . . [I]t is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'

Respondents and the courts below have found no cases recognizing an EAP privilege except the unpublished perfunctory and ambiguous memorandum in *Greet v. Zagrocki*, 1996 WL 724933 (E.D. Pa. 1996).[1]

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[1] The Ninth Circuit's reliance on *U.S. v. Lowe*, 948 F.Supp. 97, 99, 101 (D.Mass. 1996) (privilege for rape counseling by trained unlicensed counselors under direct control and supervision of a licensed therapist) is misplaced. Unlike SCIF's EAP counselors, the *Lowe* counselors were specifically trained for a very narrow category of crisis counseling under direct supervision of a licensed therapist, much like a medical assistant or paralegal. Furthermore *Lowe* held that most of the counseling records sought were non-privileged information such as date of contact or a person's identity. If that type of information were disclosed here, it would help Oleszko to find the witnesses she needs.

Actually *Lowe* contradicts much of the Ninth Circuit's reasoning in *Oleszko* because, as Weinstein's Federal Evidence explains, when a paraprofessional receives information while working under the close supervision of the professional person, such as an assistant taking a history for a psychiatrist, then the privilege extends to the paraprofessional, but when the

Furthermore only one state, Rhode Island, recognizes a general EAP communications privilege, but its statute does not define EAP, or explain what information obtained by an EAP is confidential. R.I. Gen. Laws § 28-6.8-1. While the Ninth Circuit claims that five other states have enacted EAP privileges, in fact those privileges are very limited. They do not resemble anything like the broad EAP privilege announced by the Ninth Circuit. Examination of the six shows that except for Rhode Island each one is either limited only to certain groups of state employees or else requires licensure or certification for the EAP professional.[2]

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paraprofessional works independently, as in *Oleszko*, then the privilege does not apply. 3 Weinstein's Federal Evidence, 2nd ed., 2001, § 504.08[5].

The Ninth Circuit's reliance on *Lara v. City of Albuquerque*, 971 P.2d 846 (N.M.App. 1998) is also inappropriate. In *Lara* the court applied New Mexico's statutory psychotherapist-patient privilege to protect "medical records" made by a therapist and placed in the employee's EAP file. Placing the records in an EAP file did not change the fact that they were psychotherapist-patient records. 971 P.2d at 847-848, 849-850.

[2] Conn. Gen. Stat. § 52-146n creates an EAP privilege only for communications of some but not all state court employees with their EAP.

Ind. Code Ann. § 25-40-2-2 creates an EAP privilege, but only for communications with EAP professionals who are either certified or meet specific experience and training requirements stated in the statute. Ind. Code Ann. § 25-40-1-5, § 25-40-2-1.

N.H. Rev. Code Ann. § 21-I:52-a creates an EAP privilege for New Hampshire state employees only.

Or. Rev. Stat. § 181.860 prohibits disclosure of communications in "peer support counseling sessions" for law enforcement officers and emergency services providers

The "consensus among the States" is that 44 of 50 recognize no form of an EAP privilege. "Reason and experience" under F.R.E. 501 as interpreted by the Supreme Court in *Jaffee*, supra, prohibit the Ninth Circuit from creating such a privilege. 518 U.S. at 12-13.

III. The Ninth Circuit's Opinion Conflicts with the Eighth Circuit's Opinion in *Carman v. McDonnell Douglas*

Carman v. McDonnell Douglas, 114 F.3d 790 (8th Cir. 1997) considered discovery requests very similar to what plaintiff Oleszko requested here, from a company "ombudsman" very similar to the SCIF EAP. As the Eighth Circuit stated, "The dim prospect that the employee's complaint might someday surface in an unrelated case strikes us as an unlikely deterrent." 114 F.3d at 794. The court held that there was no ombudsman privilege and no reason to create one. The ombudsman's notes of meetings with individuals other than the plaintiff had to be produced, and for that reason summary judgment for the defendant was reversed. 114 F.3d at 791, 794-795. *Carman* concludes, "The creation of a wholly new evidentiary privilege is a big step. This record does not convince us that we should take it." 114 F.3d at 794.

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conducted by persons who have received training in providing emotional and moral support to personnel who have been involved in emotionally traumatic incidents in their employment.

Tenn. Code Ann. § 62-42-115 creates a privilege only for communications with *licensed* employee assistance professionals.

The Ninth Circuit here says that the ombudsman in *Carman* is different from an EAP. In fact the SCIF EAP is very similar to the *Carman* ombudsman. Both work on resolving workplace disputes, including employment discrimination disputes at SCIF, as the testimony of the SCIF EAP coordinator quoted above clearly shows. There is no reason to assume that other EAPs are different.

IV. The Ninth Circuit's Opinion Violates Fundamental Policies of this Court and of American Jurisprudence

There is a well established policy that privileges are to be narrowly construed. As Wigmore said, "The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion of these privileges." 8 Wigmore, Evidence, McNaughton rev., 1961, § 2192, p. 73.

That is why this Court in *Jaffee* struggled with the question of whether the psychotherapist-patient privilege should extend to licensed social workers or instead should be limited to psychiatrists and psychologists. See Justice Scalia's dissent in *Jaffee*, supra, 518 U.S. at 27-28.

The reasons for the narrow construction of privileges are clear:

> In the past, this Court has well understood that the particular value the courts are distinctively charged with preserving – justice – is severely harmed by contravention of "the fundamental principle that '"the public . . . has a right to every man's evidence." '" *Trammel v. United*

> *States*, 445 U.S. 40, 50, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980) (citation omitted). Testimonial privileges, it has said, *"are not lightly created nor expansively construed,* for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) (emphasis added). Adherence to that principle has caused us, in the Rule 501 cases we have considered to date, to reject new privileges . . .

Jaffee, supra, dissent, 518 U.S. at 19.[3]

CONCLUSION

Employee assistance programs are a widespread fact of working life. They receive information from employees on a great many subjects and provide a wide variety of services. The Ninth Circuit has announced a privilege for all such communications, regardless of whether the subject matter is psychotherapy, and regardless of whether the EAP counselor has a professional license of any kind.

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[3] Except for *Jaffee*, supra, this Court has consistently rejected proposed new privileges. See *University of Pa. v. EEOC*, 493 U.S. 182, 189, (1990) (rejecting academic peer review privilege); *United States v. Arthur Young & Co.*, 465 U.S. 805, 817, (1984) (rejecting work product immunity for accountants); *United States v. Gillock*, 445 U.S. 360, 373, (1980) (rejecting speech-or-debate privilege for state legislators); *Trammel v. United States*, 445 U.S. 40, 51-53 (1980) (rejecting privilege against adverse spousal testimony, but continuing to recognize privilege for confidential marital communications); *Couch v. United States*, 409 U.S. 322, 335 (1973) (rejecting accountant-client privilege); *Branzburg v. Hayes*, 408 U.S. 665, 690-91, (1972) (rejecting news reporter's privilege).

The quantity and variety of evidence that will be suppressed by this new privilege is vast. If this Court allows such a privilege to stand, it "ignores this traditional judicial preference for the truth, and ends up creating a privilege that is new, vast, and ill-defined." *Jaffee*, supra, *dissent*, 518 U.S. at 19-20.

Respectfully submitted,

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Attorney for Petitioner

Dated: July 18, 2001

APPENDIX

Document	Page
Court of Appeals' Opinion Affirming the Denial of Discovery, Oleszko v. State Compensation Insurance Fund, 243 F.3d 1154 (9th Cir. 2001), March 20, 2001	App. 1
Court of Appeals' Unpublished Memorandum Affirming Summary Judgment. March 20, 2001	App. 13
Court of Appeals' Order Denying Rehearing, May 3, 2001	App. 16
Excerpts of deposition of EAP Coordinator Paul Read, November 20, 1996, Appellant's Excerpts of Record, Docket and Tab No. 64, 7: 26:20-28:9	App. 17
Transcript of District Court Hearing on Plaintiff's Motion to Compel Discovery, May 23, 1997, Appellant's Excerpts of Record, Docket and Tab No. 98	App. 22
District Court's Unpublished Order Denying Motion to Compel Discovery, June 5, 1997, Appellant's Excerpts of Record, Docket and Tab No. 88	App. 35
District Court's Unpublished Order Granting Summary Judgment on the First Cause of Action, August 30, 1996, Appellant's Excerpts of Record, Docket and Tab No. 50	App. 37
District Court's Unpublished Order Granting Summary Judgment on the Entire Action, January 20, 1999, Appellant's Excerpts of Record, Docket and Tab No. 98	App. 39

United States Court of Appeals,
Ninth Circuit

Oksana OLESZKO, Plaintiff-Appellant,

v.

STATE COMPENSATION INSURANCE FUND, David Howard, and Dora Cooke, Defendants-Appellees.

No. 99-15207.

Argued and Submitted Oct. 4, 2000

Filed March 20, 2001

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William F. Krebs, Galland, Kharasch, Greenberg, Fellman & Swirsky, Washington, D.C., for amicus curiae Employee Assistance Professional Associations, Inc., in support of defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding. D.C. No. CV-95-00516-VRW.

Before: D.W. NELSON, THOMPSON, and TROTT, Circuit Judges.

D.W. NELSON, Circuit Judge:

Oksana Oleszko appeals the denial of her motion to compel discovery from the State Compensation Insurance

Fund's ("SCIF") Employee Assistance Program ("EAP").[1] The district court concluded that the federal psychotherapist-patient privilege protected the requested information from disclosure. *See Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

BACKGROUND

This case arose from Oleszko's Title VII claim against the SCIF and her individual supervisors, in which she alleged sexual harassment, reverse race and national origin discrimination, and retaliation. Oleszko sought discovery from the SCIF's EAP in an attempt to show a pattern of sex and race discrimination and retaliation on the part of the SCIF. The SCIF's EAP refused to produce records or to testify about the substance of communications with other employees on the ground that the communications were privileged under Federal Rule of Evidence 501 and the Supreme Court's holding in *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337. The district court agreed and denied Oleszko's motion to compel discovery on June 5, 1997. Oleszko now appeals the district court's order denying discovery.

Employee Assistance Programs are worksite-based programs designed to assist employees in identifying and resolving personal issues, ranging from health, marital, and financial concerns to substance abuse and emotional

[1] We address the remaining issues raised on appeal in a memorandum disposition filed concurrently.

problems. Employee Assistance Professionals Association Standards for Employee Assistance Programs, Part II: Professional Guidelines ("EAPA Standards") at 1. EAPs began in the 1970s as alcohol and drug treatment programs but have substantially broadened their scope and have become increasingly prevalent at all different types of workplaces. Michael T. French et al., Factors that Influence the Use and Perception of Employee Assistance Programs at Six Worksites, 2 J. of Occupational Health Psychol. 312, 312 (1997) ("Six Worksites"). Today, 45 percent of all full-time workers have access to EAPs. Terry C. Blum & Paul M. Roman, U.S. Dep't of Health and Human Servs., Cost-Effectiveness and Preventive Implications of Employee Assistance Programs ("Cost Effectiveness") 2 (1995). Over 17,000 employers have adopted EAPs. Brief of Amicus Curiae, Employee Assistance Professionals Association, at 2. The number of EAPs in Fortune 500 companies has more than tripled since 1972. Bureau of National Affairs, Inc., Employee Assistance Programs: Benefits, Problems, and Prospects 11 (1987). Ninety-five percent of such companies currently offer their employees counseling and referral services through EAPs. Paul M. Heck, *The Evolving Role of EAPs in Managed Behavioral Healthcare: A Case Study of DuPont, in* The Employee Assistance Handbook 291, 291 (James M. Oher ed., 1999).

EAP counselors help to resolve issues affecting employee health and well-being by providing comprehensive assessments and short-term counseling, referring clients for appropriate treatment where necessary, and providing follow-up services. Arlene A. Darick, *Clinical Practices and Procedures, in* The Employee Assistance

Handbook 3, 4-12. EAPs have been shown to reduce absenteeism, on-the-job-accidents, and worker's compensation claims, and to improve work performance. Cost Effectiveness at 13.

The SCIF's EAP is staffed by a coordinator and three consultants. Although no one on the staff is a licensed psychiatrist, psychologist, or social worker, all of the consultants have backgrounds in psychology or social work, including relevant clinical and/or field experience.[2] In addition, all SCIF EAP staff members regularly participate in ongoing training and education on EAP-related issues.

Confidentiality is a key component of the EAP. According to the Employee Assistance Professionals Association, "EAPs are committed to maintaining confidentiality" and "[p]rogram success and credibility hinge, to a large extent, on employee confidence that the EAP respects individual privacy and adheres to confidentiality requirements and procedures." EAPA Standards at 2.[3] At the SCIF's EAP, that confidentiality policy is strictly

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[2] Unlike the SCIF's program, many EAPs do have licensed psychologists, psychiatrists, or social workers on staff. *See* Brief of Amicus Curiae, at 3, n. 2 (noting that the licensed social worker who provided psychotherapy to the defendant in *Jaffee v. Redmond* was employed by the city's EAP).

[3] Studies of employee attitudes toward EAPs support the EAPA's claim. At least two studies have shown that many employees view confidentiality as an important prerequisite to their use of an EAP. *See* Six Worksites at 323; Michael M. Harris & Mary L. Fennell, Perceptions of an Employee Assistance Program and Employees' Willingness to Participate, 24 J. of Applied Behavioral Sci. 423, 432, 434 (1988).

enforced. Only EAP personnel have access to EAP files, which are kept in a locked cabinet in the EAP office, and all EAP records are shredded after five years.

II.

DISCUSSION

A. The Psychotherapist-Patient Privilege: *Jaffee v. Redmond*

This case concerns the scope of the federal psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337. We must decide whether the district court erred in concluding that SCIF employee communications with EAP personnel are privileged. *See United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir.1995) (a district court's rulings regarding the scope of a privilege are reviewed de novo).

Jaffee v. Redmond involved a 42 U.S.C. § 1983 lawsuit against Mary Lu Redmond, a police officer who received extensive counseling from a licensed clinical social worker after she shot and killed a man while responding to a disturbance at an apartment complex. 518 U.S. at 4-5, 116 S.Ct. 1923. During discovery, the decedent's estate sought access to the social worker's notes from her counseling sessions with Redmond. *Id.* at 5, 116 S.Ct. 1923. The Supreme Court denied discovery of the notes, reasoning that the important public and private interests in protecting confidential communications to one's psychotherapist outweighed any evidentiary benefit that would result from denial of the privilege. *Id.* at 11-12, 116 S.Ct. 1923.

While the *Jaffee* decision created an absolute privilege for "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment" and extended the privilege to licensed social workers engaged in psychotherapy, *id.* at 15, 116 S.Ct. 1923, it explicitly left to later courts the task of "delineat[ing][the] full contours" of the privilege. *Id.* at 18, 116 S.Ct. 1923 (internal quotations omitted). The question we face is whether the psychotherapist-patient privilege recognized in *Jaffee* extends to unlicensed counselors employed by the SCIF's EAP. We hold that it does.

Although no federal circuit court has previously addressed this question, our conclusion that the psychotherapist-patient privilege extends to communications made to EAP counselors is supported by two district court opinions that have also extended the psychotherapist-patient privilege to unlicensed counselors. In *Greet v. Zagrocki*, 1996 WL 724933, *2 (E.D.Pa.1996), the court held that EAP personnel were covered under the privilege recognized in *Jaffee*. *United States v. Lowe*, 948 F.Supp. 97, 99 (D.Mass.1996), extended the psychotherapist-patient privilege to rape crisis counselors who were neither licensed psychotherapists nor social workers but were under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist, or psychotherapist.

The contrary cases on which Oleszko relies are easily distinguished. In *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir.1997), the Eighth Circuit held that communications to an ombudsman employed to resolve workplace disputes without litigation were not protected by the psychotherapist-patient privilege. *Id.* at 791. The

court concluded that the resolution of workplace disputes prior to litigation was not a sufficiently important interest to justify the creation of a new evidentiary privilege. *Id.* at 793. The EAP, by contrast, assists in resolving employees' mental health problems, which *Jaffee* unequivocally determined to be a "public good of transcendent importance." 518 U.S. at 11, 116 S.Ct. 1923.

Oleszko also argues that *United States v. Schwensow,* 151 F.3d 650 (7th Cir.1998), counsels against extending the psychotherapist-patient privilege to EAPs. In *Schwensow,* the Seventh Circuit held that statements made to volunteer telephone operators at an Alcoholics Anonymous office were not protected by the psychotherapist-patient privilege because the volunteers did not act or hold themselves out as counselors, were not licensed or trained in counseling, and did not confer in a fashion resembling a psychotherapy session. *Id.* at 657. Unlike the telephone operators in *Schwensow,* the EAP's purpose is to provide counseling. EAP personnel are trained as counselors, are held out as counselors in the workplace, and, like psychotherapists, their job is to extract personal and often painful information from employees in order to determine how best to assist them.

B. Extending the Psychotherapist-Patient Privilege

In extending the psychotherapist-patient privilege to licensed clinical social workers, the *Jaffee* majority concluded that "[t]he reasons for recognizing a privilege for treatment by psychiatrists apply with equal force to treatment by . . . clinical social worker[s]." 518 U.S. at 15, 116 S.Ct. 1923. The Court focused on three main rationales for

extending the privilege. First, it pointed out that social workers provide a significant amount of mental health treatment. *Id.* at 15-16, 116 S.Ct. 1923. Second, it explained that social workers often serve the poor and those of modest means who cannot afford a psychiatrist or psychologist, "but whose counseling sessions serve the same public goals." *Id.* at 16, 116 S.Ct. 1923. Third, the Court noted that the vast majority of states extend a testimonial privilege to licensed social workers. *Id.* at 16-17, 116 S.Ct. 1923.

The reasons for recognizing a privilege for treatment by psychiatrists or social workers apply equally to EAPs. EAPs, like social workers, play an important role in increasing access to mental health treatment. *Cf.* Six Worksites at 312 (describing the growth of EAPs since the 1970s). Growing numbers of EAPs help employees who would otherwise go untreated to get assistance. The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging more people to seek treatment. EAPs also assist those who could not otherwise afford psychotherapy by providing and/or helping to obtain financial assistance.[4]

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[4] Many companies even *require* assessment by an EAP before they will pay for mental health treatment for their employees. Ellen Schultz, *If Your Firm Uses Counselors, Remember Your Secrets Could Be Used Against You*, Wall St. J., May 26, 1994, at C1. Refusing to recognize an EAP-client privilege would force these employees to reveal confidences that would not be protected by privilege in order to access mental health treatment.

As a majority of the Supreme Court recognized in *Jaffee*, the provision of mental health services has significantly changed in the last quarter century. 518 U.S. at 16 n. 16, 116 S.Ct. 1923. EAPs embody what may be viewed as a team approach to providing mental health services. Thus, although EAP personnel at the SCIF do not engage in psychotherapy themselves, they serve as a primary link between the troubled employee and psychotherapeutic treatment.[5] As part of the mental health "team," they have access to much of the same highly sensitive information that is protected by privilege when revealed to a treating psychiatrist or social worker. To protect only disclosures made during psychotherapy while exposing those same disclosures to discovery when made to another member of the mental health team in order to access psychotherapy would significantly undermine the psychotherapist-patient privilege.[6]

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[5] Unlike the social worker in *Jaffee*, personnel at the SCIF's EAP are not professionally licensed. Because of the rapid growth of EAPs, states are only just beginning to establish licensing requirements for EAP personnel. *See, e.g.*, N.C. Gen Stat. § 90-503; Tenn.Code Ann. § 62-42-104. There is currently no state licensing system for EAPs in California. As state laws begin to catch up with the rapid growth in EAPs, more states will undoubtedly establish licensing programs and state licensure may, in turn, become a more relevant factor in determining whether a particular EAP is legitimate.

[6] This point becomes more clear if we consider an EAP, such as the one in *Jaffee*, whose staff includes licensed psychiatrists, psychologists, or social workers. In that case, sensitive information regarding an employee will likely be shared between unlicensed EAP counselors and licensed therapists on staff. Indeed, such an office would probably maintain one file containing the assessment and treatment notes

Although the majority of state legislatures have yet to create a specific privilege for the confidential communications to EAP counselors, a number of states have begun to recognize such a privilege. *See* Conn. Gen.Stat. § 52-146n (West 2000) (recognizing a privilege for communications between state judicial department employees and EAP counselors); Ind.Code Ann. § 25-40-2-2 (West 2001) (recognizing a privilege for communications between a client and an employee assistance professional); N.H. Rev. Code Ann. § 21-I:52-a (2000) (confidential communications between state employees and EAP representatives are privileged); Or.Rev.Stat. § 181.860 (1999) (prohibiting confidential communications in a peer support counseling session for emergency service providers or law enforcement personnel to be used in adjudicatory proceedings); R.I. Gen. Laws § 28-6.8-1 (2000) ("No employer shall release the name, address, or otherwise breach the confidentiality of information obtained through an employee's participation in an employer assistance program, except where the information is related to a crime which must otherwise be reported by law."); Tenn.Code. Ann. § 62-42-115 (2000) ("The confidential relations and communications between a licensed employee assistance professional and client are the same as those provided by law for licensed psychologists, psychological examiners, physicians, and social workers."); *see also Lara v. City of Albuquerque,* 126 N.M.

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for a given employee. To recognize a privilege only for the licensed counselors would force EAP personnel to choose between communicating with each other in order to provide the best possible treatment for the employee and protecting privileged information.

455, 458-59, 971 P.2d 846, 849-50 (Ct.App.1998) (including within the state psychotherapist-patient privilege confidential communications to EAP counselors made for the purpose of diagnosis or treatment).[7]

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[7] Additional legislation at both the state and federal level also reflects societal recognition of the benefits of EAPs. The Drug Free Workplace Act of 1988 (41 U.S.C. § 701 et seq.) requires federal contractors and federal grant recipients to establish drug-free awareness programs which inform employees about the availability of EAPs. 41 U.S.C. §§ 701(a)(1)(B)(iii) & 702(a)(1)(B)(iii) (West 2001). A number of states have also implemented drug-free workplace statutes in order to maximize productivity and reduce the costs associated with substance abuse by employees. *See, e.g.*, Ala.Code § 25-5-330 (2001); Ark.Code Ann. § 11-14-101 (1999); Cal. Gov't Code § 19816.16 (West 2001); Fla. Stat. Ann. § 112.0455 (West 2001); Ga.Code Ann. § 34-9-410 (2000); Idaho Code § 72-1701 (2000); 30 Ill. Comp. Stat. Ann. 58 0/3 (West 2001); S.C.Code Ann. § 44-107-30 (2000); Tenn.Code Ann. § 50-9-101 (2000). Similarly, a provision of the Small Business Act (15 U.S.C. § 631 et seq.) that provides aid to small businesses to establish drug-free workplace programs requires that such programs include employee access to confidential EAPs. 15 U.S.C. § 654 (West 2001). Recognizing the importance of EAPs in promoting the safety and productivity as well as the health and well-being of their employees, both the federal government and many states have implemented confidential EAPs for public employees. *See, e.g.*, 5 U.S.C. § 7904 (requiring that the head of each Executive agency establish an EAP for that agency); Fla. Stat. Ann. §§ 110.1091 & 125.585; Me. Rev. St. Ann. tit. 5 § 957 (West 1999); N.H.Rev.Stat. Ann. § 21-I:52-a (2000); Mass. Gen. L. Ann. ch. 7 § 28B (West 2000); Minn.Stat. Ann. § 43A.319 (West 2000); N.Y. Mental Hygiene Law § 41.54 (McKinney 2000); N.D. Cent.Code § 44-04-18.1 (1999); Okla. Stat. tit. 74 § 840-2.10 (2000); Wash. Rev.Code Ann. § 41.04.700 (West 2000).

III.

CONCLUSION

EAPs work to address serious national problems, from substance abuse and depression to workplace and domestic violence. Given the importance of the public and private interests EAPs serve, the necessity of confidentiality in order for EAPs to function effectively, and the importance of protecting this gateway to mental health treatment by licensed psychiatrists, psychologists, and social workers, we hold that the psychotherapist-patient privilege recognized in *Jaffee v. Redmond* extends to communications with EAP personnel.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OKSANA OLESZKO, Plaintiff-Appellant, v. STATE COMPENSATION INSURANCE FUND, DAVID HOWARD, and DORA COOKE, Defendants-Appellees.	No. 99-15207 D.C. No. CV-95-00516-VRW MEMORANDUM* (Filed Mar 20, 2001)

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judges, Presiding

Argued and Submitted October 4, 2000
San Francisco, California

Before: D.W. NELSON, THOMPSON, and TROTT, Circuit Judges.

Oksana Oleszko appeals the district court's summary judgment in favor of defendants on her claims of sexual harassment, race and national origin discrimination, and retaliation in violation of Title VII, and intentional infliction of emotional distress under California law.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

[1] We address Oleszko's appeal from the denial of her motion to compel discovery from the Employee Assistance

Oleszko alleges that the romantic relationship between two of her supervisors, Dora Cooke and David Howard, amounts to sexual harassment of her. She claims that Mr. Howard targeted her because Ms. Cooke did not like her. Even if true, this scenario amounts to neither quid pro quo nor hostile environment sexual harassment. *Cf. Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) (finding no actionable sex discrimination claim based on allegation that co-worker who had romantic affair with supervisor received favorable treatment).

Oleszko has likewise failed to raise a genuine issue of disputed fact as to her race and national origin discrimination and retaliation claims. Because Oleszko has alleged no verbal or physical conduct of a racial nature, her claim of a racially hostile work environment must fail. *See Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998) (describing requirements of a hostile workplace claim). As for her disparate treatment claim, even assuming that Oleszko has made out a prima facie case of discrimination, she has submitted no evidence that defendants' legitimate, nondiscriminatory reasons for failing to promote her were mere pretext for discrimination.[2] Oleszko has similarly failed to show that the defendants'

Program in a published opinion filed concurrently.

[2] Oleszko's statistical evidence does not aid her attempt to prove disparate treatment. Rather than analyzing the racial characteristics of those who scored in the top three ranks on the civil service exam from which SCIF hires, Oleszko bases her statistical analysis on the broader group of "computer programmers" and "computer systems analysts" in the bay area, rendering the analysis meaningless.

neutral reasons for their alleged retaliation were pretextual. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) ("[W]hen evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* case based on a *McDonnell Douglas* type presumption.").

Finally, Oleszko's claim for intentional infliction of emotional distress is precluded by workers compensation exclusivity. *Cole v. Fair Oaks Fire Protection Dist*, 43 Cal.3d 148, 160, 729 P.2d 743, 750 (1987) ("[W]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code.").

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OKSANA OLESZKO, Plaintiff-Appellant, v. STATE COMPENSATION INSURANCE FUND, DAVID HOWARD, AND DORA COOKE, Defendants-Appellees.	No. 99-15207 D.C. No. C-95 00516 VRW ORDER (Filed May 3, 2001)

Before: D.W. NELSON, THOMPSON and TROTT, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Trott voted to deny the petition for rehearing en banc. Judges D.W. Nelson and Thompson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P.35).

The petition for rehearing and the petition for rehearing en banc are denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OKSANA OLESZKO, Plaintiff, vs. STATE COMPENSATION INSURANCE FUND, STATE OF CALIFORNIA, DAVID HOWARD and DORA COOKE, Defendants.	)	CASE NO. C-95-00516 EFL

DEPOSITION OF PAUL J. READ
NOVEMBER 20, 1996
RAMONA REINHARDT
CERTIFIED SHORTHAND REPORTER NO. 2677
428 NORTH STREET
OAKLAND, CALIFORNIA 94609
510/652-4337

* * *

[26] requesting from the Employee Assistance Program specifically, most especially with respect to financial support of costs that the identified resources might have for assisting any further assessments in problem resolution.

Q. Do you routinely meet with employees in your office when you talk to them personally?

A. Yes. Yes, I do.

Q. Typically how long is such an interview? Or is there a typical amount of time?

A. It could vary from one employee to another.

Q. For example, doctors often have appointments every twenty minutes or other people schedule appointments every half hour or every ten minutes, something like that. Do you have a system of that sort?

A. No, we don't have a fixed system.

Q. Depends on the situation?

A. Yes, it depends on the situation. We are responsive to the situations outlined.

Q. When you refer an employee to an outside – I should make this clear. If I understand you right, at times you will refer an employee to an outside resource of various types and as appropriate, within certain limits, pay for what's needed; is that correct?

A. Yes, we will refer an employee to an outside [27] resource and cover some of the costs of utilizing that resource, yes.

Q. What types of outside resources are we talking about? I mean, I understand and I presume psychologists, licensed clinical social workers, psychiatrists, MDs and others. Are the ones I've mentioned the types you typically use?

A. Yes, that's correct.

Q. Are there other categories that you refer to from time to time as well?

A. Yes.

Q. What are they?

A. The resources that we identify that would assist a person in resolving the situation could include, besides the types of people you mentioned, could include financial counselors, could include community groups that are organized around certain problems or certain areas, could include local agencies in terms of the – that do help groups, identify different areas of concern, housing, child care, those sorts of things. Could be an attorney to help them assess legal aspects of a situation or problem. It could be government agencies that would assist somebody in dealing with a problem, at least to identify it and to categorize the problem. And also within the [28] organization – well, either inside or outside the organization, to State Fund. There might be functions that would correspond to assist a person in getting the information that they might need, including but not limited to union stewards, the Equal Employment Opportunity affirmative action program, dealing directly with their supervisor, or highlighting for them matters that are resolved or at least addressed in State Fund guidelines or policies.

Q. Do you do any psychotherapy yourself?

A. No, I do not.

Q. Do you do any sort of religious counseling or provide other services of a religious nature for employees?

A. No, I do not.

Q. What types of records do you keep of your meetings with employees?

A. The records that we keep are an intake sheet which notes some identifying data on the employee and generally categorizes the presenting situation, the problem, and outlines, gives us an idea of what kind of resources we recommended. There would be some short notes perhaps on the conversation.

Q. Anything else?

A. If a referral is made to a resource, then there [29] is a written confirmation letter written to that resource, authorizing number of visits or whatever might be authorized, and including the payment scheme, how they should send back to us the billing, and then subsequently it would be any billings that we would receive, a copy would be attached to the record. That would be it.

Q. If you receive correspondence from or to the employee or e-mail messages concerning the subjects of the EAP consultation or referral, are those included?

A. Yes, those are included.

Q. Who has access to those records, that is, the types of records you just described which you maintain concerning employees' contacts with the EAP program?

A. Only the people in the Employee Assistance Program office, the consultants, and if necessary or requested, the clerk.

Q. The –

A. Clerk.

Q. Who is that? What clerk?

A. The secretary, the clerk.

Q. Of that program?

A. Of the Employee Assistance Program.

Q. How about the employees themselves? Maybe it's never come up. I don't know.

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EUGENE F. LYNCH, JUDGE

OKSANA OLESZKO, PLAINTIFF, VS. STATE COMPENSATION INSURANCE FUND, ET AL., DEFENDANTS.	)	NO. C 95-0516 VRW (EFL)

SAN FRANCISCO, CALIFORNIA
FRIDAY, MAY 23, 1997

FOR PLAINTIFF:
PETER G. LOMHOFF, ESQ.
ATTORNEY AT LAW
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OAKLAND, CALIFORNIA 94612

FOR DEFENDANT:
CELEBREZZE & WESLEY
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17TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

BY: GRAZIELLA W. COGGAN, ESQ.
JEFFREY L. ADAMS, ESQ.

FOR DEFENDANT:
THELEN, MARRIN, JOHNSON & BRIDGES
383 SOUTH GRAND AVENUE
SUITE 3400
LOS ANGELES, CALIFORNIA 90071-3193

BY: DAVID L. BACON, ESQ.

REPORTED BY:
JAMES J. YEOMANS, CSR
OFFICIAL COURT REPORTER, USDC

COMPUTERIZED TRANSCRIPTION BY XSCRIBE

[2] *FRIDAY, MAY 23, 1997* *10:00 A.M.*

THE COURT: OLESZKO VERSUS STATE COMP FUND.

THE CLERK: CIVIL 95-0516.

APPEARANCES, PLEASE.

MS. COGGAN: GOOD MORNING.

GRAZIELLA COGGAN FOR THE STATE COMPENSATION INSURANCE FUND, EAP AND PAUL READ.

MR. LOMHOFF: PETER LOMHOFF FOR THE PLAINTIFF.

MR. BACON: DAVID BACON FOR THE DEFENDANT STATE COMP INSURANCE FUND AND THE CO-DEFENDANTS.

THE COURT: OKAY. YOU HAVE THE TENTATIVE RULING?

MS. COGGAN: YES.

MR. LOMHOFF: YES. A COUPLE OF POINTS STRUCK ME THAT I'D LIKE TO ADDRESS HERE.

FIRST OF ALL, OR COURSE, I AGREE WITH THE FIRST POINT OF THE TENTATIVE RULING, IF THERE'S NO LICENSE THERE'S NO PRIVILEGE. BUT WE DO HAVE TO GO ON FROM THERE AND, I BELIEVE, 501, EVIDENCE CODE 501 DOES DEAL WITH PRIVILEGE.

YOU CITED THE *KIENTZY* CASE WHICH IS A PRE-JAFFEE CASE WHICH ANALYZES PRIVILEGE, BUT THERE'S A PROBLEM WITH FOLLOWING *KIENTZY*. AND THAT IS, THAT THE ANALYSIS USED IN *KIENTZY* WAS SPECIFICALLY DISCUSSED, NOT THE NAME OF THE CASE, BUT THE TYPE OF ANALYSIS WAS DISCUSSED IN THE *JAFFEE* DECISION, THE RECENT U.S. SUPREME COURT DECISION.

[3] AND THEY SPECIFICALLY SAID, WE REJECT THE 7TH CIRCUIT'S BALANCING APPROACH HERE, WHICH IS WHAT WAS USED A COUPLE OF YEARS EARLIER, SEVERAL YEARS EARLIER IN *KIENTZY*. SO, IN EFFECT, *KIENTZY* WAS A METHOD OF ANALYSIS THAT'S BEEN OVERRULED BY *JAFFEE*.

KIENTZY LOOKS AT THE LOSS OF EVIDENCE VERSUS – IN THE PARTICULAR CASE THE HARM TO THE PARTICULAR CASE VERSUS THE HARM IF YOU VIOLATE THE PROPOSED PRIVILEGE, BALANCES IN THE PARTICULAR CASE AND DECIDES ON BALANCE IN THAT CASE THAT IT'S OKAY TO FIND A PRIVILEGE.

BUT *JAFFEE* SAYS WE PART COMPANY WITH THE COURT OF APPEALS, THIS IS REFERRING TO *JAFFEE* CASE, THE LOWER COURT CASE, WE PART COMPANY WITH COURT OF APPEALS ON A SEPARATE POINT. WE REJECT THE BALANCING COMPONENT OF THE PRIVILEGE IMPLEMENTED BY THAT COURT.

THE COURT: SO YOUR ARGUMENT, NO PRIVILEGE PERIOD, GOODBYE, YOU GET ALL THIS INFORMATION?

MR. LOMHOFF: THAT'S CORRECT.

THE COURT: WHAT DO YOU SAY?

MS. COGGAN: YOUR HONOR, FIRST OF ALL, I THINK MR. LOMHOFF IS MISINTERPRETING WHAT *JAFFEE* SAID. FIRST OF ALL, WHEN IT TALKS ABOUT REJECTING A BALANCING APPROACH, I THINK THAT DISCUSSION IS WHETHER THE PRIVILEGE FOR PSYCHOTHERAPIST SHOULD BE ABSOLUTE AS OPPOSED TO THE BALANCING TEST.

IT'S NOT REFERRING TO THE TEST MADE IN *KIENTZY*. [4] *KIENTZY* DOESN'T DO A BALANCING TEST, WHAT KIENTZY DOES IS APPLY THE WIGMORE FACTORS. I DON'T KNOW IF YOU ARE AWARE OF THOSE THAT HAVE BEEN BROUGHT UP IN SOME OF THE PRIVILEGE CASES, THERE'S FOUR OR FIVE FACTORS THAT COURTS ARE TO LOOK TO IN DETERMINING WHETHER A PRIVILEGE SHOULD APPLY.

KIENTZY APPLIED THOSE AND MANY COURTS AND MOST OF THE COMMENTATORS APPLY THOSE AS WELL. AND USING THOSE FOUR FACTORS IN *KIENTZY* THE COURT FOUND THE PRIVILEGE. THOSE SAME FOUR FACTORS AS WE SAID IN OUR PAPERS AND SHOWN IN OUR PAPERS APPLY HERE, TOO, TO SHOW THAT THERE SHOULD BE ANY ONE PRIVILEGE.

THE COURT: I DON'T READ *JAFFEE* JUST TO REJECT IT OUT OF HAND, PERSONALLY. NO ABSOLUTE PRIVILEGE PERIOD. YOU HAVE TO GO THROUGH THE 501 CONCEPT.

MS. LOMHOFF: WELL, WHAT *JAFFEE* DOES, IS SAY THAT THE BALANCING TEST, WHICH IS ONE OF THE CLASSIC FACTORS COUNSEL JUST REFERRED TO IN THE OLD TREATISE AND FOLLOWED IN *KIENTZY* AND SOME OF THE OTHER CASES, THAT THAT IS NOT WHAT THEY'RE GOING TO ACCEPT ANYMORE IN *JAFFEE*.

THAT'S WHY THEY SAY WE REJECT THE BALANCING COMPONENT OF THE PRIVILEGE APPOINTED BY THAT COURT IN A SMALL NUMBER OF STATES.

THEY GO ON TO EXPLAIN IT'S NOT MUCH OF A PRIVILEGE IF YOU WON'T KNOW WHETHER THE PRIVILEGE APPLIES IN A PARTICULAR CASE UNTIL A COURT MAKES A DECISION ON IT. SO WE'RE NOT TALKING ABOUT A BALANCING TEST TO DETERMINE AS A GENERAL [5] POLICY.

THE COURT: WHERE DO YOU READ IN *JAFFEE* THAT IT SAYS IT'S TOTALLY INAPPROPRIATE FOR THE COURT TO DO ANY BALANCING TEST UNDER 501, THAT THERE'S EITHER A PRIVILEGE AS A MATTER OF LAW OR NO PRIVILEGE?

THAT'S YOUR ARGUMENT, ESSENTIALLY, THE PRIVILEGE IS EITHER TOTAL OR NONE AT ALL.

MR. LOMHOFF: YES.

THE COURT: EITHER COMPLETE PRIVILEGE OR NO OTHER PRIVILEGE OF ANY TYPE REGARDLESS OF THE BALANCING TEST. WHERE IN *JAFFEE* DO YOU GET THE LANGUAGE THAT SAYS THAT?

MR. LOMHOFF: IN THE LAWYER'S EDITION VERSION OF THE CASE AT PAGE 349, FIRST FULL PARAGRAPH, WHICH IS THE ONE I STARTED READING HERE.

THE COURT: I HAVE 116TH SUPREME COURT I'M LOOKING AT.

MR. LOMHOFF: LAST I CHECKED I HADN'T SEEN THE U.S. EDITION.

THE COURT: WHY DON'T YOU PASS YOURS UP?

MR. LOMHOFF: THE SUBSECTION IV, ROMAN IV I HAVE THERE'S A LONG PARAGRAPH AT THE BEGINNING OF THAT PART OF THE CASE ENDING WITH A REFERENCE TO FOOTNOTE 19 AND THEN THE NEXT PARAGRAPH IS WHAT I'M TALKING ABOUT.

THE COURT: STARTS OUT BY OUR CASE MAKES CLEAR ASSERTED PRIVILEGE BUT ALSO SERVE PUBLIC END.

MR. LOMHOFF: NO. I'D BE HAPPY TO PASS UP MY COPY OF [6] THIS JUST FOR A MOMENT. WHAT I'M REFERRING TO IS MY YELLOW BOX ON THE RIGHT-HAND PAGE HERE.

THE COURT: YOU SAY THAT GIVES THEM AN AUTOMATIC PRIVILEGE, IS WHAT YOU SAY, RIGHT?

MS. COGGAN: I'M SORRY, YOUR HONOR.

THE COURT: UNDER THESE CIRCUMSTANCES WHAT YOU'RE SAYING IS *JAFFEE* SAYS THEY HAVE AN ABSOLUTE PRIVILEGE.

MS. COGGAN: I THINK WE'RE MIXING APPLES AND ORANGES HERE. I THINK THE COURT IN *JAFFEE* SAYS ABSOLUTE.

THE COURT: THEREFORE, IMPROPER TO DO A BALANCING TEST IN THIS TYPE OF SITUATION, NOT OUR SITUATION BUT IN THE *JAFFEE* SITUATION.

MS. COGGAN: IT'S IMPROPER TO DO A BALANCING OF A BURDEN OF NOT PRODUCING THE EVIDENCE PLUS THE BURDEN IF IT IS EXCLUDED. THAT'S APPLES AND ORANGES. THAT'S TALKING ABOUT WHETHER THE PRIVILEGE IS GOING TO BE – IT'S A PRIVILEGE NO MATTER WHAT, NO MATTER HOW RELEVANT THE EVIDENCE IS, AS OPPOSED TO WHAT MR. LOMHOFF IS SAYING THERE'S SOME SORT OF BALANCE ACT, THAT'S TWO DIFFERENT THINGS.

THE COURT: WHAT YOU'RE SAYING, IF IT'S AN ABSOLUTE PRIVILEGE WE DON'T DO THE BALANCE, THAT'S WHAT *JAFFEE* IS SAYING?

MS. COGGAN: WITH RESPECT TO PSYCHOTHERAPISTS.

THE COURT: THAT ARE LICENSED, CORRECT?

MS. COGGAN: RIGHT, BUT *JAFFEE* DOES LEAVE OPEN THAT [7] THE BREATHE [sic] OF THAT PRIVILEGE CAN BE DONE ON A CASE-BY-CASE BASIS.

THE COURT: RIGHT. BUT IT DOESN'T DO AWAY THE 501 BALANCING AT ALL.

MS. COGGAN: ABSOLUTELY NOT.

THE COURT: BUT WHAT IT DOES DO AWAY WITH, WHEN A PRIVILEGE IS ABSOLUTE YOU DON'T GO THROUGH THE BALANCING TEST.

MS. COGGAN: EXACTLY.

THE COURT: I THINK THAT'S RIGHT.

MR. LOMHOFF: I DO DISAGREE THERE, BECAUSE I THINK WHAT *JAFFEE* IS SAYING, YES, *JAFFEE* RECOGNIZES SOME BALANCING, BUT THE POINT IS TO DISTINGUISH BALANCING IN THE INDIVIDUAL CASE WHICH *JAFFEE* REJECTS, BECAUSE YOU DON'T HAVE A MEANINGFUL PRIVILEGE IF YOU DON'T KNOW IF IT'S GOING TO APPLY UNTIL THE COURT MAKES A DECISION AS OPPOSED TO BALANCING OF THE GENERAL PRINCIPLE.

SURE, YOU USE BALANCING IN *JAFFEE* TO DETERMINE, FOR EXAMPLE, IF WE'RE GOING TO HAVE A PRIVILEGE FOR LICENSED SOCIAL WORKERS DOING PSYCHOTHERAPY AND THEY CONSIDER THE FACTORS AND BALANCE THEM, AS A GENERAL MATTER DECIDE THIS CATEGORY OF COMMUNICATION OUGHT TO BE PRIVILEGED.

THE COURT: I UNDERSTAND YOUR ARGUMENT ESSENTIALLY IS THAT *JAFFEE* HAS SAID YOU EITHER HAVE A TOTAL PRIVILEGE OR YOU HAVE NO PRIVILEGE, THERE'S NO SUCH PRIVILEGE IN WHICH YOU BALANCE AT ALL.

[8] MS. COGGAN: IN THE INDIVIDUAL CASE, THAT'S CORRECT.

THE COURT: I DISAGREE WITH THAT, IS ALL I CAN SAY. I THINK SHE'S ABSOLUTELY RIGHT. JUST DIDN'T READ 501 OUT. THAT'S ESSENTIALLY WHAT YOU'RE ARGUING.

MR. LOMHOFF: I DON'T THINK SO. I THINK I'M READING IT WAS INTERPRETED BY THE U.S. SUPREME COURT LAST YEAR.

THE COURT: I UNDERSTAND YOUR ARGUMENT, 501 WOULDN'T BE AROUND ANYMORE, THERE IS NO PRIVILEGE PERIOD.

MR. LOMHOFF: IF I MAY, WITHOUT BELABORING IT, I THINK THAT *JAFFEE* IS VERY MUCH WITHIN AND FOLLOWING ACCURATELY AND LITERALLY 501, BUT WHAT IT LOOKS AT TO DETERMINE TO A CASE, IS PRIVILEGE BY PRIVILEGE, YOU MIGHT SAY.

SOME PRIVILEGE WE LOOK AT THEM INDIVIDUALLY AS EACH TYPE OF THING, EAP OR ALCOHOL COUNSELORS OR SOMEONE IN THE UNION ADVISING A POLICE OFFICER OF A HEARING, THESE ARE THE CATEGORIES YOU LOOK AT.

THE COURT: I UNDERSTAND. WHAT YOU'RE SAYING, YOU USE THE BALANCING SOLELY TO DETERMINE WHETHER THERE SHOULD BE AN ABSOLUTE PRIVILEGE OR NOT.

WHEN THERE'S – DECIDED THERE SHOULD BE, THAT'S THE END OF THE BALLGAME. THERE'S NO SUCH TYPE OF SITUATION WHERE YOU WEIGH

BACK AND FORTH UNDER CERTAIN CIRCUMSTANCES, LET'S LOOK WHAT DOES HE NEED, HOW IMPORTANT IS THIS TO SOCIETY, WHAT IS THE REASON, ET CETERA, IN LIGHT OF REASON AND EXPERIENCE. I JUST DISAGREE, IS ALL I CAN SAY.

[9] MR. LOMHOFF: A COUPLE OF FURTHER POINTS, IF I MAY. YOU ALSO MENTIONED THAT WE HAVE NO EVIDENCE THAT ANYONE EVER WENT TO THE DEFENDANT'S EAP PROGRAM COMPLAINING ABOUT RETALIATION. RETALIATION IS PROBABLY MORE PRECISE THAN I CAN GIVE YOU EVIDENCE FOR.

I CAN GIVE YOU AT LEAST TWO ITEMS OF EVIDENCE PEOPLE HAVE GONE THERE CONCERNED ABOUT DISCRIMINATION PROBLEMS OF DIFFERENT SORT, WHICH I THINK IS MORE THAN CLOSE ENOUGH.

NUMBER ONE, MR. READ SAID IN HIS DEPOSITION THAT ONE OF THE RESOURCES HE MIGHT REFER PEOPLE TO IS, AS HE PHRASED IT, THE EQUAL EMPLOYMENT OPPORTUNITY AFFIRMATIVE ACTION PROGRAM.

AND, NUMBER TWO, IT'S NOT MENTIONED IN THE PAPERS HERE, BUT IT'S ACTUALLY IN THE RECORD IN THE PENDING SUMMARY JUDGMENT MOTION, ONE OF THE PEOPLE WE HAVE DISCOVERED WHO HAS COMPLAINED OF RETALIATION OR AT LEAST THE COMPANY THOUGHT THE WAY HER CASE, ONE PERSON WROTE A MEMO WITHIN THE COMPANY, WROTE THAT HER CASE MIGHT APPEAR TO BE RETALIATION AGAINST THE EMPLOYEE.

THAT EMPLOYEE SAYS IN HER CORRESPONDENCE, WHICH IS IN MY DECLARATION IN THE SUMMARY JUDGMENT MOTION, THAT SHE WENT TO THE EAP PROGRAM, THE EAP ADVISED HER TO SEE A LAWYER, SHE HAD DISCUSSED THE ISSUES THERE WITH SOMEONE IN THE EAP, THAT WAS A SEXUAL HARASSMENT CASE.

THE COURT: YOU DON'T HAVE A SEXUAL HARASSMENT CASE.

MS. COGGAN: SUPPOSE THOSE PEOPLE DON'T GET INTO THE [10] EAP RECORDS?

THE COURT: THIS IS REALLY GOING INTO PEOPLE GOING TO ALCOHOL AND DRUG COUNSELING.

MS. COGGAN: ALL SORTS OF PERSONAL PROBLEMS. MY ARGUMENT IS, IF MR. LOMHOFF IS AWARE OF OTHER WITNESSES OR EVIDENCE AVAILABLE TO HIM, GO DIRECTLY TO THE SOURCE.

THE FACT THAT INFORMATION WAS COMMUNICATED TO THE EAP DOESN'T MAKE IT OTHERWISE UNDISCOVERABLE, BUT THE COMMUNICATION TO THE EAP ARE CONFIDENTIAL THEMSELVES.

AND, ADDITIONALLY, I POINT OUT WITH RESPECT TO THE EAP, IF THAT MATERIAL EVER BECOMES DISCOVERED, THE CONFIDENTIALITY THAT IS PROJECTED THERE IS BETWEEN AN EMPLOYEE, BETWEEN THE EMPLOYEE AND THE EAP, AND THE VERY PEOPLE THAT SHE OR HE MAY WANT TO KEEP THAT INFORMATION CONFIDENTIAL FROM IS HER EMPLOYER AND CO-WORKERS

AND THOSE ARE EXACTLY THE PEOPLE THAT WOULD SEE IT IN THIS CASE.

THE COURT: I THINK IT WOULD DO AWAY THE WHOLE CONCEPT.

MS. COGGAN: EXACTLY. EAP WOULD GO DOWN THE DRAIN BASICALLY.

THE COURT: SO I WOULD DENY THE MOTION FOR DISCOVERY. THEN WE NEED TO SET THE MOTION FOR SUMMARY JUDGMENT OR ARGUMENT, IS THE 13TH A GOOD DATE?

MR. LOMHOFF: UNFORTUNATELY THAT'S NOT.

THE COURT: WHAT'S A BETTER DATE FOR YOU?

[11] MR. LOMHOFF: MY FIRST CHOICE WOULD BE JUNE 27TH.

THE COURT: IS THAT ALL RIGHT? FOR HEARING ON THE SUMMARY JUDGMENT. THAT'S CONVENIENT FOR YOU, IS THAT ALL RIGHT?

MR. BACON: YES, THAT'S FINE.

THE COURT: 27TH, 10:45.

MS. COGGAN: YES.

MR. LOMHOFF: THANK YOU.

(THE ABOVE MATTER ADJOURNED)

CERTIFICATE OF REPORTER

I, JAMES YEOMANS, CERTIFIED SHORTHAND REPORTER NO. 4039 FOR THE STATE OF CALIFORNIA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 11, INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH CERTIFIED SHORTHAND REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

/s/ James Yeomans
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OKSANA OLESZKO, Plaintiff, v. STATE COMPENSATION INSURANCE FUND, et al., Defendants.	Case No. C-95 00516 EFL (~~PROPOSED~~) ORDER DENYING PLAINTIFF OKSANA OLESZKO'S MOTION TO COMPEL DISCOVERY Date: May 23, 1997 Time: 10:45 a.m. Ctrm.: 6 (Filed Jun. 05, 1997)

The motion of plaintiff Oksana Oleszko for an order compelling discovery came on for hearing before this Court on May 23, 1997, the Honorable Eugene F. Lynch, presiding. Plaintiff was represented by Peter Lomhoff. Defendant State Compensation Insurance Fund was represented by David Bacon. State Compensation Insurance Fund Employee Assistance Program and Paul Read were represented by Graziella Walsh Coggan. After consideration of the briefs and papers and the arguments of

counsel, and all matters presented to the Court, IT IS HEREBY ORDERED that Plaintiff's motion compelling discovery is DENIED.

Dated: JUN 05 1997, 1997

EUGENE F. LYNCH
United States District Judge
Eugene F. Lynch

Approved as to Form:

/s/ Peter Lomhoff
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OKSANA OLESZKO, Plaintiff, vs. STATE COMPENSATION INSURANCE FUND, STATE OF CALIFORNIA, DAVID HOWARD and DORA COOKE, Defendants.	Case NO. C-95 00516 EFL [~~PROPOSED~~] ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FIRST CLAIM FOR RELIEF FOR ALLEGED SEXUAL HARASSMENT DATE: August 30, 1996 TIME: 10:45 a.m. DEPT: Hon. Eugene F. Lynch (Filed Aug. 30, 1996)

The Court, having considered defendant State Compensation Insurance Fund's ("SCIF") Motion for Summary Judgment on Plaintiff's First Alleged Claim for Relief for Alleged Sexual Harassment pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff's opposition, and SCIF's reply, and having heard oral argument of counsel, hereby orders as follows:

1. SCIF's Motion for Summary Judgment on Plaintiff's First Claim for Relief for Alleged Sexual Harassment is Granted.

2. Plaintiff shall have no recovery on such claim, which is hereby dismissed with prejudice.

Dated: August 30, 1996

/s/ Eugene F. Lynch
EUGENE F. LYNCH
United States District Court
Judge

APPROVED AS TO FORM:

Peter G. Lomhoff
Attorney for Plaintiff
Oksana Oleszko

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OKSANA OLESZKO,
Plaintiff,
v.
STATE COMPENSATION INSURANCE FUND, STATE OF CALIFORNIA, DAVID HOWARD and DORA COOKE
Defendants.

No. C-95-00516 VRW

(FILED JAN 20 1999)

ORDER

Plaintiff Oksana Oleszko is a computer programmer for defendant State Compensation Insurance Fund. She alleges that her employer and various supervisors sexually harassed her and discriminated against her based on her race and national origin in violation of Title VII, 42 USC § 2000e et seq. Plaintiff also alleges that defendants retaliated against her for opposing an employment practice made unlawful by Title VII and claims intentional infliction of emotional distress. By an order dated August 30, 1996, Judge Eugene F. Lynch, who previously presided over this case, granted defendants summary judgment on the sexual harassment claim. By his July 3, 1997, order, Judge Lynch granted partial summary judgment on the retaliation and intentional infliction of emotional distress claims.

Currently pending before the court are defendants' motion for summary judgment on plaintiff's claims of race and national origin discrimination, retaliation and

intentional infliction of emotional distress and plaintiff's counter-motion for reconsideration of Judge Lynch's July 3, 1997, order. The court finds these motions appropriate for decision without oral argument. Civil LR 7-1(b). The hearing scheduled for Janaury [sic] 15, 1999, at 10:30 am is, therefore, VACATED.

I

The July 3, 1997, order dismissed the intentional infliction of emotional distress claim as to those acts by defendants that plaintiff alleged constituted retaliation because, as a matter of law, those acts did not constitute "extreme or outrageous conduct," required to state a claim for intentional infliction of emotional distress under California law. Judge Lynch also held that plaintiff could not state a claim for retaliation based on defendants' failure to promote her because she did not follow the correct procedures for seeking a promotion.

Judge Lynch further limited plaintiff's retaliation claim by ruling that plaintiff could not recover for retaliation based on conduct occurring prior to late June or early July of 1993. Plaintiff claims that defendants retaliated against her for reporting to an affirmative action officer that she had been mistreated by one of her supervisors, David Howard, because she had complained about mistreatment by Dora Cooke, another of plaintiff's supervisors, with whom Howard was maintaining an improper romantic relationship. Plaintiff reported this mistreatment, which the affirmative action officer believed constituted sexual harassment, on April 27, 1993. Howard admitted learning of the April 27, 1993,

report in late June or early July of 1993. Judge Lynch ruled that plaintiff failed to raise a triable issue of fact as to defendants' knowledge of the report at any time before Howard admitted learning of it. Consequently, the order limits plaintiff's retaliation claim to conduct occurring after late June or early July of 1993.

Civil Local Rule 7-9(a) provides that "[n]o party shall notice a motion for reconsideration without first obtaining leave of court to file the motion." After obtaining leave of court, the party must file a motion that shows: (1) a material difference in fact or law from that which was presented to the court before entry of the interlocutory order for which reconsideration is sought; or (2) emergence of new material facts or a change of law occurring after the time of such order; or (3) manifest failure by the court to consider material facts which were presented to the court before the order to be reconsidered. See Civil LR 7-9(b).

Plaintiff styles her motion a "counter-motion for leave to file a counter-motion for reconsideration and counter-motion for reconsideration." Apparently, plaintiff believes that she has satisfied the requirement of Civil LR 7-9(a) by captioning her motion as both a motion for leave of court and a motion for reconsideration. Civil LR 7-9(a) makes clear, however, that a party must obtain leave of court *before* noticing the motion for reconsideration, not simultaneously with the motion for reconsideration. Plaintiff's interpretation would eviscerate the rule. Accordingly, plaintiff's failure to obtain leave of court before noticing her motion for reconsideration is an independent and sufficient ground for denying her motion.

Even if she had followed proper procedure, however, plaintiff's motion would be defective for failure to satisfy Civil LR 7-9(b). Plaintiff first claims that she has discovered new evidence that her employers were aware of her April 27, 1993, report of an alleged instance of sexual harassment before late June or early July of 1993, thereby undermining the basis for the portion of Judge Lynch's order that limits plaintiff's claim of retaliation to events occurring after late June or early July of 1993. This "new evidence" comes from the deposition testimony of two of plaintiff's supervisors, Shelly Mullins and Joel Hogg. Plaintiff alleges that she was unable to take these two deposition [sic] until May and June 1998 because of delay by the defendants in producing documents. See Declaration of Peter G. Lomhoff in Opposition to Defendant's Motion for Summary Judgment ("Lomhoff Decl") at ¶3(b).

Plaintiff refers to portions of the Mullins deposition that reveal that on May 6, 1993, Mullins received an email from plaintiff that stated that "[d]ue to possible violations of the union contract, I need to talk to my job steward." Lomhoff Decl, Exh B at 50. Mullins testified, however, that she does not remember what plaintiff told her about the possible violations of the union contract or even whether she ever spoke to plaintiff about it. See id. Plaintiff also points to Mullins' testimony that Howard was a "hands on" manager and that he sometimes "micromanaged" important projects. See id. at 121-22. Mullins' testimony about Howard's management style is confirmed by Joel Hogg. See Lomhoff Decl, Exh C at 148-49, 160-61, 175.

Plaintiff claims that the "possible violations of the union contract," she referenced in the email that she sent

Mullins concerned her complaint of unfair treatment connected with the Howard-Cooke relationship. Plaintiff does not explain, however, how Mullins testimony supports an inference that Mullins knew what the "possible violations of the union contract" were when Mullins herself testified that she did not remember what contract violations plaintiff was referring to or even speaking to plaintiff about the email. See Lomhoff Decl, Exh B at 52. Plaintiff argues that the Mullins and Hogg testimony about Howard's management style is evidence that Howard must have known about plaintiff's April 27, 1993, report because it was consistent with his general tendency to know what was going on at the office. The court declines plaintiff's invitation to speculate about what Howard knew. Evidence of Howard's management style simply does not raise a triable issue of fact as to Howard's knowlege of plaintiff's report.

Plaintiff also claims to have new facts demonstrating that she followed correct procedures when she applied for a promotion, thereby undermining Judge Lynch's ruling that plaintiff could not recover for retaliation based on failure to promote because she failed to follow correct procedures for seeking a promotion. Plaintiff's briefs argue at length that plaintiff did, in fact, follow correct procedures, but the only supposed "new evidence" on that issue comes from the Mullins and Hogg depositions. Mullins and Hogg both testify that they were aware that plaintiff was on a promotion eligibility list at the Public Utilities Commission, another state agency. See Lomhoff Decl, Exh B at 61-62; Exh C at 48-49. This evidence simply is not new. Judge Lynch had before him evidence of plaintiff's placement on the Public Utilities Commission

list and of the procedures necessary to transfer her eligibility to her employer. See Memorandum in Support of Defendant's Motion for Summary Judgment filed on 12/06/96 at 15 & n20.

Finally, plaintiff claims to have discovered new law that

> show[s] that the nature of the adverse action necessary to support a Title VII claim is very different from what had been understood before the court's July 3, 1997, order. [And shows] that plaintiff's evidentiary burden to defeat summary judgment on a retaliation claim is much less than had been thought previously.

Plaintiff's Motion for Reconsideration at 4. Plaintiff proceeds to cite the following five cases, all of which were decided after July 3, 1997: *Burlington Industries, Inc v. Ellerth,* 118 S Ct 2257 (1998); *Faragher v. City of Boca Raton,* 118 S Ct 2275 (1998); *Hashimoto v. Dalton,* 118 F3d 671 (9th Cir1997); *Payne v. Norwest Corp,* 113 F3d 1079 (9th Cir1997). While most of these cases discuss some aspect of Title VII, none of them represents any change in the controlling law relevant to Judge Lynch's decision.

That plaintiff did not obtain leave of court to file her motion for reconsideration is reason enough to deny it. Plaintiff does not show any change in fact or law that justifies revisiting Judge Lynch's order. Accordingly, plaintiff's "counter-motion for leave to file a counter-motion for reconsideration and counter-motion for reconsideration," (Doc 108), is DENIED.

II

The court now turns to defendants' motion for summary judgment on plaintiff's claims of race and national origin discrimination and retaliation.

Summary judgment is a method for the prompt disposition of an action in which there is no genuine issue of material fact. FRCP 56(c) provides for the granting of summary judgment where the moving party is entitled to judgment as a matter of law. The burden of establishing that there is no genuine issue of material fact lies with the moving party. *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by pointing out the absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. A conclusory statement asserting an absence of evidence will not suffice to meet this standard; the lack of evidence must be demonstrated. Id at 326. Once the moving party has met its burden either by presenting evidence which, if uncontradicted, would entitle it to a directed verdict at trial or by demonstrating the lack of evidence for the nonmoving party's case, FRCP 56(e) shifts to the nonmoving party the burden of presenting specific facts showing a genuine issue for trial. *British Airways Bd v. Boeing Co*, 585 F.2d 946, 950-52 (9th Cir 1978).

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. Rather, responses, either by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue of fact. A mere "scintilla" of evidence supporting the nonmoving party's position will

not suffice. There must be enough of a showing that the jury could reasonably find for the nonmoving party. *Anderson v. Liberty Lobby, Inc,* 477 U.S. 242, 248 (1986).

The question in summary judgment motions is whether reasonable minds could differ as to the import of the evidence. *Eisenberg v Insurance Co of North America,* 815 F.2d 1285, 1288 (9th Cir 1987). "If the evidence is merely colorable * * * or is not significantly probative, summary judgment may be granted." *Id* at 1288. The nonmoving party's evidence is to be taken as true and all inferences are to be drawn in the light most favorable to the nonmoving party. *Eisenberg,* 815 F.2d at 1289.

Plaintiff's claims of retaliation, race and national origin discrimination all share a common element: Under the allocation of proof established for Title VII cases in *McDonnell Douglas Corp v. Green,* 711 U.S. 792 (1973), plaintiff has the burden, as part of her prima facie case, to demonstrate that she suffered an adverse employment action as a result of the alleged discrimination. See *Tarin v. County of Los Angeles,* 123 F.3d 1259 (9th Cir 1997) (race discrimination); *Jordan v. Clark,* 847 F.2d 1368 (9th Cir 1988) (retaliation); *Yartzoff v. Thomas,* 809 F.2d 1371 (9th Cir 1987) (national origin discrimination).

Defendants' failure to promote plaintiff does not constitute adverse employment action for any of her claims. Judge Lynch found in his July 3, 1997, order that plaintiff did not follow the correct procedures for seeking a promotion and that plaintiff, therefore, could not recover for retaliation based on defendants' failure to promote her. Because there was no motion for summary judgment on the race and national origin discrimination claims before

him, Judge Lynch did not rule that plaintiff was similarly barred from relying on defendants' failure to promote her in advancing those claims. However, it is apparent that the same bar applies. Indeed, the case to which the July 3, 1997, order cites, *Yartzhoff*, 809 F.2d at 1374, involved a claim of national origin discrimination. Accordingly, Judge Lynch's finding that plaintiff did not follow the correct procedures for seeking a promotion prevents her from relying on defendants' failure to promote her as adverse employment action to support her claims of race and national origin discrimination, just as she cannot rely on that failure to support her retaliation claim.

Although plaintiff offers numerous examples of perceived mistreatment by her employer that she argues constitute adverse employment action in retaliation for her April 27, 1993, report, she alleges no conduct specifically intended to discriminate against her on the basis of her race or national origin. Instead, in the portion of her brief devoted to those claims, plaintiff states that "[a]s shown above there was considerable adverse action against [plaintiff]." Plaintiff's Opposition to Defendants' Motion for Summary Judgment ("Pl's SJ Opp") at 23-24. Presumably, plaintiff is claiming that those actions that she argues were motivated by retaliation were additionally or alternatively motivated by her race or national origin. Leaving aside her general and conclusory complaints about her employer, plaintiff offers the following allegations of mistreatment that she argues constitute adverse employment actions:

> (1) Shelly Mullins, plaintiff's supervisor, dramatically changed her attitude toward plaintiff,

such that plaintiff began to sense real hostility from her.

(2) Mullins, who worked on the seventh floor and was rarely seen on the fifth floor, began waiting by the elevator by the fifth floor, where plaintiff worked, apparently waiting for her.

(3) Mullins criticized plaintiff on an occasion when plaintiff arrived late.

(4) When another employee made a joke about arriving late, David Howard, another of plaintiff's supervisors, shushed her and looked toward plaintiff's cubicle.

(5) Mullins criticized plaintiff for leaving to get coffee immediately after arriving for work.

(6) Personnel Roster Job #4257, initially assigned to plaintiff, was reassigned to someone else.

(7) Plaintiff did not receive any "meaningful" work on the Personnel Database, which she regarded as her specialty, between April, 1993 and June, 1996.

(8) Mullins "stopped responding" to plaintiff's efforts to complete jobs #4054 and #4057.

(9) Job #4545, initially assigned to plaintiff, was later assigned to someone else.

(10) Plaintiff did not receive the help she believes she needed to complete jobs #5029 and #4545.

(11) Nicki Camarco, a systems analyst assigned to work with plaintiff on Job #4039, received all the credit, even though plaintiff worked with her as an equal.

> (12) On September 20, 1993, plaintiff was assigned to do table updates, a job that she concedes is within her job description, but that she claims is normally assigned to new programmers.
>
> (13) Plaintiff did not receive credit for Job #4921 because it was reassigned to someone else before she completed it.
>
> (14) Plaintiff's access to and training on DB2, a new database management system, was delayed.

Pl's SJ Opp at 6-14.

"While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy in an actionable adverse action." *Smart v. Ball State University,* 89 F3d 437, 441 (7th Cir 1996). In *Steiner v. Showboat Operating Co,* 25 F3d 1459, 1465 n6 (9th Cir 1994), the plaintiff claimed that a transfer from the swing shift to the day shift was an "adverse employment action" by her employer in retaliation for an EEOC complaint. Although the court ultimately decided that the transfer was not retaliatory, it noted that "the transfer[ ] is just barely – if at all – characterizable as 'adverse' employment action: Steiner was not demoted, or put in a worse job, or given any additional responsibilities." *Id.* Another judge in this district, interpreting *Steiner,* concluded that the term "adverse employment action" should be construed restrictively such that an employment action is not "adverse" unless "it affects the terms, privileges, conditions or duration of a plaintiff's job." *Lefevre v Design Professional Insurance Companies,* 1994 WL 544430 at * 8 (ND Cal).

Other circuits, in varying factual contexts, have similarly emphasized the requirement that an action materially affect a plaintiff's employment before it can be considered adverse. See, e.g., *Ledergerber v. Stangler,* 122 F3d 1142, 1144 (8th Cir 1997) (holding that replacement of an employee's entire staff and placement in her file of a statement that discriminatory practices would not be tolerated did not constitute adverse employment action); *Robinson v. City of Pittsburg,* 120 F3d 1286, 1300 (3rd Cir 1997) (holding that unsubstantiated oral reprimands and unnecessary derogatory comments did not constitute adverse employment action); *Manning v Metropolitan Life Insurance Company, Inc,* 127 F3d 686, 692 (8th Cir 1997) (holding that general allegations of hostility and personal animus and allegation that disability benefits were improperly handled did not constitute adverse employment action); *Mattern v. Eastman Kodak Company,* 104 F3d 702, 707 (5th Cir 1997) (holding that hostility from fellow employees, having tools stolen and resulting anxiety did not constitute adverse employment action).

Although most of the above cited cases were decided in the context of claims of retaliation, the same requirement of demonstrating an adverse employment action applies where plaintiff is alleging discriminatory conduct based on any of the Title VII categories. See, e.g., *Connors v Chrysler Financial Corporation,* 160 F3d 971, 973-74 (3rd Cir 1998) (rejecting plaintiff's age discrimination claim for failure to establish an adverse employment action); *Ledergerber,* 122 F3d at 1144 (rejecting plaintiff's race discrimination claim for failure to establish an adverse employment action).

The court first notes that of the actions plaintiff complaints [sic] of, only numbers seven through fourteen occurred after late June or early July of 1993. Pursuant to Judge Lynch's order, only those actions can be considered in determining whether plaintiff has met her burden of establishing an adverse employment action for the purpose of her retaliation claim. It is, in any event, apparent to the court that the actions plaintiff alleges fall well below the threshold for adversity established by the case law in this circuit and others. None of the claimed actions, nor the sum of them, materially affected the terms, privileges, conditions or duration of her employment; she "was not demoted, or put in a worse job, or given any additional responsibilities." *Steiner,* 25 F3d at 1465 n6.

Plaintiff has failed to establish that she suffered an adverse employment action and has therefore failed to establish a prima facie case for her claims of retaliation, race and national origin discrimination. Accordingly, defendants' motion for summary judgment on plaintiff's second and third claims for relief (Doc 55) is GRANTED.

III

Plaintiff's fourth cause of action alleges intentional infliction of emotional distress. Judge Lynch's July 3, 1997, order held that none of the actions that plaintiff alleges constituted retaliation were sufficiently "extreme or outrageous" to support a claim for intentional infliction of emotional distress under California law, but expressly declined to rule on whether plaintiff might be

able to allege incidents of racial discrimination that satisfied that standard. As discussed above, plaintiff does not allege any mistreatment by her employer that she believes was directed at her specifically because of her race or national origin, but appears to incorporate the actions she believes to be retaliatory into her claims for race and national origin discrimination.

It would therefore appear that the July 3, 1997, order is, in fact, dispositive of plaintiff's intentional infliction of emotional distress claim. Nevertheless, the court holds that none of the actions referred to by plaintiff, regardless of the alleged motivation, is sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress. See *Schneider v. TRW, Inc,* 938 F3d 986, 992 (9th Cir 1991), citing *Cole v Fair Oaks Fire Protections District,* 43 Cal3d 148, 155 n7 (1987).

Defendants' motion for summary judgment (Doc 55) is therefore GRANTED as to plaintiff's fourth cause of action.

IV

The instant order grants summary judgment to defendant as to plaintiff's second, third and fourth causes of action; Judge Lynch's August 30, 1996, order granted summary judgment to defendants on plaintiff's first cause of action. Nothing remains of plaintiff's complaint. Accordingly, the clerk shall enter judgment, close the file and terminate all pending motions.

IT IS SO ORDERED.

/s/ Vaughn R. Walker
VAUGHN R. WALKER
United States District Judge

Supreme Court, U.S.
FILED
AUG 22 2001
CLERK

No. 01-127

IN THE

Supreme Court of the United States

OKSANA OLESZKO,
Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND, DAVID HOWARD, and DORA COOKE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this employment discrimination action, the employer obtained summary judgment because petitioner failed to establish essential elements of her federal civil rights claims. She also sought discovery of other employees' records from the employer's Employee Assistance Program ("EAP"), to see if there were a pattern and practice of discrimination. Petitioner failed to establish her civil rights claims because of facts specific to her workplace situation, an outcome that could not be changed by discovery of other employees' communications to the EAP. The lower courts denied the discovery request, holding the records privileged under the psychotherapist-patient privilege established in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The question presented is:

Should the psychotherapist-patient privilege recognized in *Jaffee v. Redmond* be extended to an EAP which provides confidential assessment of employee problems, makes referrals which may include licensed psychiatrists, psychologists and clinical social workers, communicates directly with the psychotherapist and pays for the treatment in some instances, and follows up with the employee to offer support and make certain the referral and psychotherapy are effective?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent State Compensation Insurance Fund is an agency of the State of California. As such, it has no parent company, and no subsidiary companies.

Respondents David Howard and Dora Cooke are natural persons.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. Introduction 1

B. Facts 2

1. Oleszko's Civil Rights Claims 2

2. The SCIF Employee Assistance Program 4

C. Proceedings Below 6

REASONS FOR DENYING THE WRIT 8

I. The Petition Seeks Review Of A Court of Appeals' Opinion On A Unique Discovery Issue That Is Irrelevant To The Ultimate Outcome Of The Case And Does Not Involve Disagreement Among The Circuits. 8

II. The Court Of Appeals' Opinion Does Not Conflict With This Court's Opinion In *Jaffee v. Redmond*. 10

A. Extending the Psychotherapist-Patient Privilege to SCIF's EAP Serves Important Private Interests. 11

B. Extending the Psychotherapist-Patient Privilege to SCIF's EAP Serves Important Public Interests. 14

C. No Evidentiary Benefit Would Result From Denying the Privilege to Communications to SCIF's EAP Counselors. 18

III. The Court of Appeals' Opinion Does Not Violate Rule 501 Of The Federal Rules Of Evidence As Interpreted In *Jaffee v. Redmond*. 19

IV. The Court of Appeals' Opinion Does Not Conflict With The Eighth Circuit's Opinion in *Carman v. McDonnell Douglas*. 22

V. The Court of Appeals' Opinion Correctly Extends The Psychotherapist-Patient Privilege to SCIF's Employee Assistance Program. 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Carman v. McDonnell Douglas Corp.,
114 F.3d 790 (8th Cir. 1997) 22

Greet v. Zagrocki,
1996 WL 724933 (E.D. Pa. 1996)..... 11

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) 7

Jaffee v. Redmond,
518 U.S. 1 (1996) ..... *passim*

United States v. Lowe,
948 F.Supp. 97 (D. Mass. 1996) 11

STATUTES

5 U.S.C. § 7904(a) 18

41 U.S.C. § 701(a)(1)(B)(iii) 18

42 U.S.C. § 2000e *et seq.* 2, 8

Cal. Government Code
§ 8355 18
§ 19816.16 18

TABLE OF AUTHORITIES, continued

Page(s)

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Rule 501 ..... 1, 6, 8-10, 19, 22

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25 C. Wright & K. Graham, *Federal Practice & Procedure* § 5531 (1989) 14

TABLE OF AUTHORITIES, continued

Page(s)

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"Employers Confront Violence in the Workplace of the 1990's," *Medical Laboratory Observer*,Vol. 28, No. 5, p. 34 (May, 1996)..... 16

Employer Liability For Domestic Violence In The Workplace: Are Employers Walking A Tightrope Without A Safety Net? 31 Tex. Tech. L.Rev. 139 (2000)..... 16

How EAPs Improve Both Productivity And Attendance, 99-5 Compensation & Benefits for L. Off. 10 (1999) 15

"Making Sense of Violence in the Workplace," *Risk Management,* Vol. 42, No. 10, p. 50 (October, 1995)..... 16

STATEMENT OF THE CASE

A. Introduction

The Petition for Writ of Certiorari focuses on a unique discovery dispute involving communications to one employer's Employee Assistance Program ("EAP"). This discovery dispute does not, in any way, affect the ultimate disposition of the underlying federal civil rights claims. As shown below, the District Court and the United States Court of Appeals for the Ninth Circuit both correctly held, in unpublished opinions, that petitioner Oksana Oleszko could not establish essential elements of her *own* civil rights claims, holdings that would not be changed even if the requested discovery of other employees' communications to the EAP were allowed. Respondent State Compensation Insurance Fund ("SCIF"), therefore, was and is entitled to summary judgment regardless of the outcome of the discovery dispute.

Consequently, the present case is a particularly inappropriate vehicle for review by this Court of the Court of Appeals' published opinion that employee communications to SCIF's EAP should be treated as privileged under Rule 501 of the Federal Rules of Evidence and *Jaffee v. Redmond*, 518 U.S. 1 (1996). Further, the published opinion is a straightforward and correct application of Rule 501 and *Jaffee*; there is no conflict among the Circuits and, indeed, there is scant litigation in this area; and the recent decision in *Jaffee* does not require revisiting.

B. Facts

1. Oleszko's Civil Rights Claims

Since 1989, Oleszko has worked for SCIF, a state agency, at its San Francisco Home Office. Oleszko began employment at SCIF as a computer programmer.

With assistance from SCIF managers David Howard and Dora Cooke, Oleszko successfully completed her probationary period as a programmer in one year, and thus became a career civil servant in 1990. SCIF never fired, demoted, suspended, disciplined or transferred Oleszko; she never had a title taken away from her; she was never given more burdensome work assignments, written up, or denied a raise. In due course, SCIF paid her at the highest rate for a programmer.

Starting in April of 1995, SCIF placed Oleszko among the first group of programmers to receive comprehensive training on its new information technology database. Effective July 1, 1996, SCIF promoted her to associate analyst, along with approximately 30 other programmers, in a major departmental restructuring.

Oleszko claims, however, that SCIF favored Asians in its Information Technology Department. Oleszko filed suit on February 19, 1995 through her boyfriend, Peter G. Lomhoff, who happens to be a litigation attorney. Oleszko's Complaint alleged claims for sexual harassment, retaliation for reporting sex harassment, and reverse race and national origin discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et*

seq. After investigation, the Equal Employment Opportunity Commission had found all these claims to be without merit.

As to Oleszko's sexual harassment claim, the record before the District Court and Court of Appeals showed the claim failed, as a matter of law, for a host of reasons. Oleszko admittedly was not subject to any sexual advances or demands, or to any offensive remarks or touchings. She did not assert that any obscene, vulgar or sexual language was used at the Home Office; that any off-color pictures of women were posted or circulated; or that women experienced any unwelcome kissing, touching, or propositioning. In addition, she admitted that she never witnessed a SCIF employee proposition another employee, or even say or do something that she found offensive. Indeed, Oleszko admitted that as far as she knew, none of this type of conduct occurred at the Home Office. Oleszko also admitted in deposition that the "close personal relationship" between managers Howard and Cooke was not "sexual harassment" of Oleszko: "[n]o, how is that sexual harassment?"[;] "... [n]o, that is not sexual harassment."

Although Oleszko had no valid civil rights claims herself, her counsel sought discovery from SCIF's EAP regarding confidential communications by other employees in an attempt to show a pattern and practice of sex, reverse race and national origin discrimination and retaliation. Even if it existed, no such evidence could supply the missing elements of Olezsko's disparate treatment claims, however. Thus, SCIF still would be entitled to summary judgment.

2. The SCIF Employee Assistance Program

SCIF's EAP provides assessment and referral services with respect to all types of employee personal problems including substance abuse, stress, depression, physical problems and family problems. The EAP itself does not provide psychotherapy. The EAP referrals may include licensed psychiatrists, psychologists and clinical social workers. The EAP contacts the professional directly and, in some instances, the EAP will pay for treatment. The EAP also keeps in touch with the employee to offer support and make certain the referral and psychotherapy are effective. SCIF's EAP thus increases access to mental health treatment. [App. 8].

SCIF's EAP manager-counselor and the three other counselors have college degrees and backgrounds in theology, psychology or social work. All are trained counselors. Paul Read, the EAP manager, has a master's degree in theology with an emphasis in pastoral care. He has done graduate work in psychology; he has taken alcohol and substance abuse courses, and courses relating to basic EAP skills; he has received training in areas commonly encountered by EAP counselors including violence at work, grief and suicide; and he is a member of the Employee Assistance Professionals Association and has been certified by it. One of the three EAP staff counselors has a master's degree in social work; one has a bachelor's degree in psychology and is taking additional courses toward entering a master's program in that field; and the third has a bachelor's degree in

social work. All the staff counselors also have relevant clinical or field experience in psychology or social work.

SCIF's EAP booklet for employees states that if "you have a personal problem that affects your job, interferes with your life or your relationships, you owe it to yourself and those around you to get help." The booklet promises:

> **What About Confidentiality?**
>
> Using the Employee Assistance Program is strictly confidential. Your personnel file will never contain information about participation in the program. No one, neither supervisors nor co-workers, will ever be told of your participation in EAP.

The booklet also states:

> **What Problems Will The Employee Assistance Program Help With?**
>
> The EAP will help you with any situation that has the potential to interfere with your work. Employees have come to the EAP for help in dealing with problems having to do with:
>
> - family stress
> - marriage
> - divorce or separation
> - personal relationships

- legal questions
- financial concerns
- drug and alcohol abuse
- eating disorders
- gambling
- emotional distress

SCIF's EAP takes strict measures to ensure confidentiality. Only EAP personnel have access to EAP files. The files are kept in a locked cabinet in the EAP office, and all EAP files are shredded after five years. [App. 4-5].

SCIF's EAP released Oleszko's own records to her pursuant to her written waiver of confidentiality. The EAP, however, refused in 1996 to produce documents or to testify about communications by other employees based on privilege under Federal Rule of Evidence 501 and *Jaffee v. Redmond*, 518 U.S. 1 (1996). SCIF and the EAP also pointed out that Oleszko had not established the relevance of the discovery, or that less obtrusive means of discovery from other sources, such as co-workers, were unavailable to her.

C. Proceedings Below

Two District Court Judges reviewed different portions of Oleszko's civil rights claims and correctly held they were without merit in that she could not even establish a *prima facie* case. In particular, the District Court held that she could not establish adverse employment action. [App. 51]. It granted SCIF summary judgment on the civil rights claims. It also

upheld the confidentiality privilege for communications to SCIF's EAP. [App. 35-36].

On appeal, the Ninth Circuit affirmed the summary judgment in the unpublished portion of its opinion. [App. 13-15]. The Court concluded that Oleszko could not establish the elements of a sexual harassment claim. [App. 14-15]. In point of fact, Oleszko did not satisfy either the "objectively hostile" or the "subjectively perceive[d]" elements of a hostile working environment claim, both of which must be satisfied. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993). She did not personally experience any sexual harassment or witness the sexual harassment of anyone else. As SCIF pointed out to the Court, communications by other employees to the EAP could not change these results.

As to the retaliation and the reverse race and national origin claims, the Court of Appeals concluded that Oleszko failed to make out a *prima facie* disparate treatment case. [App. 14]. Additionally, the Court found that even if she had established a *prima facie* case, she submitted no evidence that SCIF's legitimate, nondiscriminatory reasons for failing to promote her before July of 1996 were mere pretext for discrimination. [App. 14]. She did not follow accepted procedures for seeking a promotion [App. 46]; she told SCIF in 1993 she did not want to be promoted; and none of her supervisors thought her work deserved a promotion. Similarly, the Court held that Oleszko failed to show that SCIF's neutral reasons for any alleged retaliation were pretextual. [App. 14-15]. Indeed, there was no retaliation. As SCIF again

pointed out to the Court, communications by other employees to the EAP could not change these results.

In its published opinion, the Court of Appeals, after an analysis of *Jaffee v. Redmond* and the EAP's role as the troubled employees' "primary link" to psychotherapy, held that employee communications to SCIF's EAP were privileged under Rule 501 and *Jaffee v. Redmond*. [App. 12].

REASONS FOR DENYING THE WRIT

I. The Petition Seeks Review Of A Court of Appeals' Opinion On A Unique Discovery Issue That Is Irrelevant To The Ultimate Outcome Of The Case And Does Not Involve Disagreement Among The Circuits.

In its unpublished opinion, the Court of Appeals properly affirmed the District Court's summary judgment in favor of SCIF on Oleszko's claims of sexual harassment, retaliation, and reverse race and national origin discrimination in violation of Title VII. [App. 13-15]. Oleszko's civil rights claims failed for reasons specific to her workplace situation, including the absence of a hostile work environment and adverse employment action [App. 51], reasons which would not change if she had obtained discovery of other employees' EAP files or the testimony of EAP staff.

As discussed below, the Court of Appeals' published opinion upholding the confidentiality of SCIF's EAP is correct. [App. 1-12]. The opinion was not at all necessary, however, to the ultimate outcome of the case. Nothing in the EAP files of other

employees, or the testimony of EAP staff, would cure the basic defects which the District Court and Court of Appeals found in Oleszko's civil rights claims. Admittedly, Oleszko had not personally experienced, or witnessed, sexual harassment of herself or others; she did not follow accepted procedures for seeking a promotion [App. 43-44, 46]; she had told her supervisors in 1993 she was not interested in being promoted; and she was not subject to adverse employment action. [App. 51, 14-15]. As a result, Oleszko could not even establish a *prima facie* case of disparate treatment. [App. 14, 51]. Even if she could, the Court of Appeals correctly found that she submitted no evidence that SCIF's legitimate, nondiscriminatory reasons for failing to promote her before July of 1996 were a mere pretext for discrimination, or that SCIF's actual reasons for any alleged retaliation were pretextual. [App. 14-15].

In short, the Court of Appeals still would be required to affirm the District Court's summary judgment even if the privilege issue were decided differently by this Court. This case, therefore, is a remarkably poor vehicle for a Supreme Court decision on whether communications to an Employee Assistance Program should be shielded by privilege under Rule 501 of the Federal Rules of Evidence. Further, there has been scant litigation, and no disagreements among the Circuit Courts, on whether employee communications to EAPs are governed by the psychotherapist-patient privilege. The recent opinion in *Jaffee v. Redmond, supra,* does not require revisiting.

II. The Court Of Appeals' Opinion Does Not Conflict With This Court's Opinion In *Jaffee v. Redmond.*

Oleszko first asserts that the Petition for Writ of Certiorari should be granted because, in her view, the Court of Appeals' published opinion directly conflicts with this Court's opinion in *Jaffee v. Redmond*, 518 U.S. 1 (1996). No such conflict exists.

In *Jaffee*, this Court recognized an absolute privilege for psychotherapist-patient communications pursuant to Rule 501. The Court looked to three factors to determine whether the asserted psychotherapist-patient privilege for communications to a licensed clinical social worker, who happened to be employed by an EAP, was sufficiently important to outweigh the need for probative evidence: (1) whether the privilege served important private interests; (2) whether the privilege served public ends; and (3) whether the evidentiary benefit resulting from the denial of the privilege was significant. *Jaffee, supra*, 518 U.S. at 10-11.

As discussed in more detail below, the Court of Appeals correctly held that the rationale used by this Court in *Jaffee* compels the recognition of a privilege for the SCIF EAP communications sought by Oleszko. [App. 12]. A recent law review article reaches the same conclusion: "In light of the clear private interests supporting an Employee Assistance Program counsel-patient privilege, the societal interest in employees seeking EAP intervention, and the necessity of confidentiality both to encouraging employees to seek counseling and to providing effective therapy, the

privilege the Supreme Court annunciated in *Jaffee* should be expanded to include EAP counselors." Jack A. Guggenheim & Dr. Aaron D. Werbel, *Confidentially Speaking: Why The Psychotherapist-Patient Privilege Should Include Employee Assistance Program ("EAP") Counselors*, 68 UMKC L.Rev. 29, 48 (1999); *see also Greet v. Zagrocki*, 1996 WL 724933, *2 (E.D. Pa. 1996); *United States v. Lowe*, 948 F.Supp. 97, 99 (D. Mass. 1996) (extending privilege to rape crises counselors under control of licensed personnel).

A. Extending the Psychotherapist-Patient Privilege to SCIF's EAP Serves Important Private Interests.

The Court of Appeals correctly held that extending the privilege to employee communications with SCIF's EAP serves important private interests, as required by *Jaffe, supra.* [App. 12].

SCIF's EAP provides confidential assessment, counseling and referral services with respect to employee personal problems including drug and alcohol abuse, stress, depression, divorce and other family problems.[1] The EAP counselor performs vital

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[1] Oleszko's argument that the communications she sought were merely evidence pertaining to "workplace counseling" and, therefore, should not be protected, is misleading and erroneous. She was not seeking generic "workplace counseling" information, namely, discussions among employers and employees and their supervisors. Rather, she was seeking confidential information in the possession of SCIF's EAP, which has taken great efforts to ensure a confidential, insulated environment where employees can consult trained counselors to

tasks that are incidental to and functionally related to diagnosis and ultimate treatment, including listening to employee confidential communications about personal problems, extracting personal and at times painful information, assessing the situation and helping to identify problems, recommending resources to be used, working with the employee to determine the best course of action, and, as appropriate, referring employees to licensed psychiatrists, psychologists, and clinical social workers. Similar to licensed clinical social workers, the EAP counselors play a significant role in increasing access to mental health treatment for less affluent people who might otherwise go untreated. [App. 8].

SCIF's EAP also works closely with the psychotherapist by writing directly to the professional to confirm the referral, to state that it is confidential, and to explain payment procedures. In addition, the EAP keeps in touch with the employee to offer support and ensure that the plan of action and psychotherapy are effective. As the Court of Appeals concluded, SCIF's EAP is structured so that it serves as the "*primary link* between the troubled employee and psychotherapeutic treatment." (emphasis added) [App. 9]. "As part of the mental health 'team'," SCIF's EAP has "access to much of the same highly sensitive

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seek assistance and referrals for sensitive personal problems. EAP communications are not casual workplace discussions around the water cooler; they involve frank, confidential and potentially embarrassing disclosures made as the first step towards obtaining assessment and referral. For the EAP to continue to exist and to function effectively, all communications must be protected from disclosure.

information that is protected by privilege when revealed to a treating psychiatrist or social worker." [App. 9].

SCIF's EAP, therefore, depends upon an atmosphere of confidence and trust in which the employee is willing to make a frank and complete disclosure of facts, emotions, memories and fears. "'Confidentiality is the cornerstone of an effective EAP'." *Confidentially Speaking*, 68 UMKC L.Rev. at 34 (citation omitted). Because of the sensitive nature of the problems confronted by the EAP, any disclosure would cause embarrassment or disgrace to the employee seeking referral and treatment. Employees with personal and private problems will not voluntarily seek help from an EAP if there is a fear that communications will not be kept confidential, especially among co-workers and supervisors. Quite likely, the employees will not obtain treatment at all. Even if an employee contacts the EAP but doubts the confidentiality of communications, the employee is less likely to disclose full information, a situation which may lead to an incomplete assessment or an ineffective referral.

Accordingly, SCIF's EAP takes great pains to offer and ensure confidentiality. [App. 4-5]. "Counseling is an integral part of most EAPs and they are therefore designed with confidentiality in mind." *Confidentially Speaking*, 68 UMKC L.Rev. at 34. Confidential employee statements to SCIF's EAP manager and counselors thus should be privileged in their own right as communications seeking not only assessment but guidance and crisis intervention, including ultimate referral and possible EAP payment

for appropriate resources such as licensed psychiatrists and psychologists.

Such communications also should be privileged as "threshold communications" which lead to the psychotherapist-patient relationship. *See* 25 C. Wright & K. Graham, *Federal Practice & Procedure* § 5531 (1989) (discussing "threshold communications" incidental to seeking therapy and communications with non-physician members of the health care delivery team that are functionally related to diagnosis and treatment). Professor Wright argues that privilege should be accorded based on the *need* for confidentiality, not on attempts to "assess the social worth of the various caring professions." *Id.* at § 5522.

As Professor Wright notes, the privilege should also attach to a person's communications to a third-party payor (which would include EAPs) because, "'since all but the most affluent must carry some sort of health insurance,'" to hold that there is no privilege in such cases would "'endow the less-wealthy, insured patient with less privacy than the wealthy, uninsured patient,'" *Id.* at § 5531 (citation omitted). Indeed, as the Ninth Circuit recognized, many health insurance plans now require employees to first utilize EAPs for assessment and referral before they may seek psychotherapy to be paid for by the insurer. [App. 8].

B. Extending the Psychotherapist-Patient Privilege to SCIF's EAP Serves Important Public Interests.

The Court of Appeals correctly held that extending the privilege to employee communications to SCIF's EAP also serves public ends, as required by

Jaffee, supra. [App. 8, 12]. EAPs illustrate the precept that "a stitch in time saves nine." All EAPs, including SCIF's program, can assist in resolving societal and workplace problems at an early stage – at little or no financial cost to the troubled employee – thus avoiding greater problems such as injuries and accidents at work, and both domestic and workplace violence. *See, How EAPs Improve Both Productivity And Attendance*, 99-5 Compensation & Benefits for L. Off. 10 (1999).

The availability of mental health treatment referrals in the workplace makes such referrals far more accessible. It also helps to reduce the stigma associated with mental health problems, thus encouraging more employees to seek treatment. In many cases, EAPs and EAP-paid or insurer-paid treatment also may present the *only* access to licensed psychiatric or psychological help that non-affluent employees will ever have. EAPs thus assist in increasing access to mental health treatment in a swift, non-stigmatized and cost-effective manner that benefits both employees and employers and American society as a whole.[2]

EAPs, therefore, are not idle exercises, as Oleszko insists. American workplaces, no less than schools, have become infected with violence. Federal

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2 The *Jaffee* Court also considered economic factors in extending the psychotherapist-patient privilege to a licensed clinical social worker. The Court recognized the unfairness of limiting the privilege to communications with psychiatrists and psychologists who may not be as economically accessible to people in need of counseling. 518 U.S. at 16-17. The great accessibility and cost-effectiveness of EAPs militate in favor of applying the privilege to EAP communications as well.

and state agencies are not immune. It is estimated that there are more than 2 million physical assaults and more than 7,000 homicides (12% of all workplace deaths) in the workplace per year. "Employers Confront Violence in the Workplace of the 1990's," *Medical Laboratory Observer*, Vol. 28, No. 5, p. 34 (May, 1996). The U.S. Department of Labor reported in 1994 that homicide replaced automobile accidents as the leading cause of death for women in the workplace and ranks as the second leading cause for men. "Making Sense of Violence in the Workplace," *Risk Management*, Vol. 42, No. 10, p. 50 (October, 1995). The cost of workplace violence is estimated at $4.2 billion per year. *Id.* These are not problems caused by the rich; the person bringing a weapon to work is more likely to arrive by bus than in a Mercedes-Benz. Organizations which assist in crisis intervention and steering a disturbed individual to psychotherapy serve a high public goal.

Not surprisingly, commentators have noted EAP effectiveness in reducing both domestic and workplace violence. *Confidentially Speaking*, 68 UMKC L. Rev. at 34; *see also*, Jill C. Robertson, *Addressing Domestic Violence In The Workplace: An Employer's Responsibility*, 16 Law & Ineq. 633, 655 (1998); *Employer Liability For Domestic Violence In The Workplace: Are Employers Walking A Tightrope Without A Safety Net?*, 31 Tex. Tech. L.Rev. 139, 177 (2000) ("EAP counselors provide excellent protection for employers and employees alike when they are trained in the area of domestic violence and its potential impact on the workplace.")

All EAPs, including SCIF's program, are also beneficial to both public and private societal interests because they increase work productivity and safety. "A large body of research shows that employee assistance programs more than pay for themselves by reducing absenteeism, on-the-job accidents, medical visits and workers compensation claims." Fran Henry, "Employers Are Extending Helping Hand to Employees," *The Plain Dealer*, December 12, 2000, at 1E. According to statistics from the Department of Labor and from the National Counsel on Alcoholism and Drug Dependence, "employers save $5 to $16 for every dollar invested in an employee assistance program." *Id. See also* William Atkinson, "Wellness, Employee Assistance Programs: Investments, Not Costs," *Bobbin*, Vol. 41, No. 9, p. 42, May 2000.

The utility of EAPs, however, depends on the strict confidentiality of communications. [App. 4]. In EAP cases, as in psychotherapist-patient cases, the threat to secrecy would block successful communications necessary to identify and assess problems and guide the individual into psychotherapy. Absent the privilege, most troubled employees would not seek EAP intervention and may not obtain treatment at all. Others would be forced to reveal confidences to the EAP counselor that would not be protected by privilege in order to access professional treatment. Still others may provide only half-truths which would impede appropriate assessment and referral. None of these alternatives serves public or private interests.

As the Court of Appeals concluded, recognition of the public and private utility of confidential EAP

programs is demonstrated by the ever-increasing number of EAPs throughout the United States and also by the number of state and federal governmental agencies which require or approve of such programs. [App. 10]. *See,* 41 U.S.C. § 701(a)(1)(B)(iii) (mention of employee assistance programs in federal contractor drug awareness programs); 5 U.S.C. § 7904(a) (relating to services available to federal employees and entitled "Employee assistance programs relating to drug abuse and alcohol abuse"; Cal. Government Code § 8355 (similar to 41 U.S.C. § 701); Cal. Government Code § 19816.16 (implementation of State Employee Assistance Program). *See also* "EAPs Help Protect Firm's Important Assets — People," *Wichita Business Journal,* Vol. 12, No. 9, p. 11 ("Nationally, more than 80 percent of the Fortune 500 companies offer some form of an EAP"); "Employee Assistance EAPs Keep Growing," *Work and Family News Brief,* August, 1995 (79% of companies surveyed in William M. Mercer study relied on EAPs). The labor agreement between the California State Employees Association and the State specifically requires a confidential EAP. Further demonstrating that EAPs serve important public goals, the District Court, the Ninth Circuit, and this Court itself provide EAPs for their own employees.

C. No Evidentiary Benefit Would Result From Denying the Privilege to Communications to SCIF's EAP Counselors.

The Court of Appeals correctly found that the third prong of *Jaffee* is satisfied, as well. [App. 8, 12]. As with the psychotherapist-patient privilege, there is

no real evidentiary benefit to denying the privilege to communications with SCIF's EAP. Employees would not make use of an EAP unless confidentiality is assured. The EAP door would be bolted. Evidence would not be lost; it would no longer come into existence. Therefore, as in *Jaffee*, the communications which Oleszko sought would not exist in the first place but for the expectation by other SCIF employees of confidentiality or privilege.

III. The Court of Appeals' Opinion Does Not Violate Rule 501 Of The Federal Rules Of Evidence As Interpreted In *Jaffee v. Redmond*.

Oleszko's second reason for granting the writ is her assertion that the Court of Appeals' opinion violates Rule 501 of the Federal Rules of Evidence as interpreted in *Jaffee, supra*. Specifically, she states that "reason and experience" prohibit the Court of Appeals from adopting a privilege for confidential communications to EAPs. Not so.

This Court's directive to consider "reason and experience" was not meant to "*freeze* the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to '*continue* the evolutionary development of testimonial privileges.'" *Jaffee, supra,* 518 U.S. at 8-9 (emphasis added) (citation omitted). The Court of Appeals observed that this Court left to later courts the task of "delineat[ing] [the] full contours" of the privilege. *Jaffee, supra,* 518 U.S. at 18. [App. 6]. The widespread acceptance and increasing use of confidential EAPs throughout this country, the private and public sectors' investments in EAPs, and

their reduction of domestic and workplace violence, are the types of circumstance which should drive the "evolutionary development of testimonial privilege" discussed in *Jaffee*. In the Court of Appeals' view, "EAPs embody what may be viewed as a team approach to providing mental health services," serving as a "primary link" – a "gateway" – between the troubled employee and mental health treatment by licensed psychiatrists, psychologists and clinical social workers. [App. 9, 12].[3]

"Reason and experience" dictate that all communications to SCIF's EAP be recognized as privileged. This is true independently of whether the counselors may handle, in the same day, employee problems involving what may appear to be a mundane matter, such as acute disappointment over a change in shift, or a full-blown emotional crisis arising from an assault at home and a threatening call to the office, a crisis which may require an immediate referral to professional help. In each instance, the employee has sought help from an agency promising assessment and referral on a confidential basis, and the employee's confidential communications should be kept confidential. Employees should know, before contacting an EAP, that a privilege will attach;

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[3] While the SCIF EAP does not provide psychotherapy, it makes confidential assessments and referrals, it corresponds directly with the professionals, it serves as a third-party payor, and it engages in follow-up sessions with employees to offer support and make certain the referrals and psychotherapy are effective. Thus, SCIF's EAP is an essential part of the mental health "team."

otherwise, there will be no contact and most likely no treatment at all.

The Court of Appeals properly concluded that all EAPs assist in resolving employees' mental health problems, which the Court in *Jaffee* determined to be a "public good of transcendent importance." 518 U.S. at 11. [App. 7]. The Court of Appeals stated that EAPs, like social workers, "play an important role in increasing access to mental health treatment." [App. 8]. EAPs have become, in essence, the blue and white collar workers' portal to psychotherapy.

The Court of Appeals recognized that while EAPs are still a fairly new creation, several states and courts have already begun to recognize a privilege for confidential communications to EAP counselors. [App. 10]. Oleszko attempts to point out dissimilarities between the various states' approaches, but dissimilarities are to be expected in any evolutionary process. The psychotherapist-patient privilege must encompass pre-counseling confidences designed to assess the problem, offer financial support and assist the troubled employee in finding professional treatment. Parallel to this Court's reasoning in *Jaffee* and Professor Wright's view of *need* as the criterion for privilege, these confidential communications are as worthy of a privilege protection as communications by the more affluent to their board-certified psychoanalysts. The individuals' needs for counseling and confidentiality are exactly the same, while a privilege for both groups serves the identical public goals. Indeed, the only difference in needs is that the less affluent may require the accessibility, referral experience and financial support

of an EAP, while the wealthy can select their own specialists and pay their own way. The only difference in societal interests is that troubled workers – unless properly referred and treated – may become less productive and pose a threat to workplace safety, added considerations which favor a testimonial privilege for EAPs.

Because EAPs assist in addressing serious national problems such as substance abuse, depression in the workplace and domestic violence, the Court of Appeals correctly found that EAPs serve both important private interests and public interests. [App. 8-9, 12]. Due to the importance of these interests and the necessity of confidentiality for EAPs to function effectively, the Court protected this "gateway" to mental health treatment by licensed professionals through a logical extension of the psychotherapist-privilege recognized in *Jaffee* to communications with EAP personnel. [App. 12].

IV. The Court of Appeals' Opinion Does Not Conflict With The Eighth Circuit's Opinion in *Carman v. McDonnell Douglas.*

Oleszko's third reason for granting the writ is her incorrect assertion that the Court of Appeals' decision conflicts with *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997). The Court of Appeals correctly distinguished the Eighth Circuit opinion. [App. 6-7].

The Eighth Circuit opinion merely held that employee communications to a corporate ombudsman, who investigated and mediated workplace disputes, were not privileged under Rule 501. Unlike an EAP,

the ombudsman's realm was limited to workplace disputes; he did not provide assessment or referral of employees' personal problems to licensed professionals. Confidentiality, therefore, was not paramount. If an employee had a meritorious workplace complaint, the person would be undeterred by the prospect of civil discovery from sharing the complaint with an ombudsman. Based on all these factors, the Court concluded that the mediation of workplace disputes prior to litigation was not a sufficiently important interest to warrant the creation of a new evidentiary privilege.

V. The Court of Appeals' Opinion Correctly Extends The Psychotherapist-Patient Privilege to SCIF's Employee Assistance Program.

Oleszko's final reason for granting the writ is her belief that the Court of Appeals' opinion supposedly violates fundamental policies of this Court and of American jurisprudence. Oleszko's views are misbegotten.

As the Court of Appeals concluded, a privilege for confidential communications to SCIF's EAP is fully warranted. [App. 12]. Similar to other EAPs, the mission of SCIF's EAP is to provide an immediate, confidential workplace solution so that small problems do not become large ones, and so that large ones do not spin out of control. SCIF's EAP ensures that employees of modest means can receive assessment, referral and, in many instances, financial assistance for psychotherapy, when required. This workplace journey to mental health care must begin with

confidential communications in the form of painful, private disclosures to the EAP counselors, threshold communications which deserve the same protection as communications to the ultimate psychotherapist.

Additionally, as the Court of Appeals observed, "[t]o protect only disclosures made during psychotherapy while exposing those same disclosures to discovery when made to another member of the mental health team in order to access psychotherapy would significantly undermine the psychotherapist-patient privilege." [App. 9]. Denial of the privilege would also undermine the EAP goals of worker productivity, mental health and the reduction in domestic and workplace violence, goals that mirror the best of society's own goals.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

OKSANA OLESZKO,

Petitioner,

v.

STATE COMPENSATION INSURANCE FUND, DAVID HOWARD, AND DORA COOKE,

Respondents.

On Petition For Writ Of Ceritorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTRODUCTION TO REPLY 1

PROCEDURAL POSTURE 1

FACTS 2

A. Facts of Oleszko's Discrimination and Retaliation Claims 2

B. Facts Concerning the SCIF Employee Assistance Program 4

RESPONSE TO "REASONS FOR DENYING THE WRIT" 5

A. Confidentiality in Business and Professional Relationships Does Not Require an Evidentiary Privilege in Federal Court 5

B. The Nature of EAP Communications Are Fundamentally Different from Heretofore Privileged Communications 6

C. Professional Communication Privileges in the Federal Courts Are Rare 7

D. The "Ombudsman Privilege" Rejected in *Carman v. McDonnell Douglas* Is Closer to the Recognized Privileges than the New EAP Privilege 8

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Bennun v. Rutgers State University, 941 F.2d 154 (2d Cir. 1991) 1

Elkins v. United States, 364 U.S. 206 (1960)..... 9

Trammel v. United States, 445 U.S. 40 (1980)..... 9

Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997).....1, 2, 6, 8

Gilbreath v. Guadalupe Hosp. Found., Inc., 5 F.3d 785 (5th Cir. 1993)..... 7

Jaffee v. Redmond, 518 U.S. 1 (1996).....7, 8

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958)..... 7

United States v. Zolin, 491 U.S. 554 (1989) 7

INTRODUCTION TO REPLY

Respondents have unfortunately severely misstated both the procedural posture of the case and the facts in the record. These misstatements must be corrected.

PROCEDURAL POSTURE

Respondents argue that the case was lost on its own facts, and could not possibly be revived even if the discovery sought from the respondents' Employee Assistance Program ("EAP") were allowed.

In fact the Court of Appeals assumed a prima facie case, but then found that petitioner Oleszko had shown no evidence that the respondents' stated reasons for their actions were a pretext. Petition, Appendix, 14-15. Evidence of other similar violations would permit a jury to find pretext. As the court stated in *Bennun v. Rutgers State University*, 941 F.2d 154 (2d Cir. 1991) at 179, a fact finder may "assess credibility in the light of the maxim, falsus in uno, falsus in omnibus . . . 'false in one thing, false in everything.' " Therefore, if EAP discovery is permitted, summary judgment will have to be reversed, and the case will be remanded for further discovery and trial.

A similar scenario occurred in *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997). The district court assumed a prima facie case but granted summary judgment because it found no evidence of pretext. The Eighth Circuit reversed, holding that the lower court had improperly denied certain discovery based on a non-existent ombudsman privilege, analogous to the EAP

privilege announced by the Ninth Circuit here. 114 F.3d at 792, 795.

FACTS

The respondent's statement of facts is an unfortunate extreme, highly prejudicial and misleading misstatement of the record. It must be corrected.

A. Facts of Oleszko's Discrimination and Retaliation Claims

Shortly after petitioner Oksana Oleszko started working as a computer programmer in the Data Processing Department at State Compensation Insurance Fund ("SCIF") in 1989, she suffered treatment which a company Affirmative Action Officer later identified as sexual harassment. Oleszko tried to just live with the situation and let the harassment subside.[1]

Several years later, on April 27, 1993, a SCIF Affirmative Action Officer received a report from another Data Processing employee about a romantic relationship between the department section head, respondent David Howard and another of Oleszko's supervisors, respondent Dora Cooke. Their relationship violated company anti-nepotism rules. The employee reported that the Howard-Cooke relationship caused harassment of others

[1] This summary is based on the facts as set forth in the declarations at Excerpts of Record ("ER"), #112, 1-28 and #113, 1-17.

in the department, including petitioner Oleszko, when Howard jealously protected his much younger girlfriend, Cooke. The Affirmative Action Officer identified the situation as sexual harassment and urged Oleszko to tell her about it. Oleszko cooperated with her investigation, but very reluctantly, because Oleszko knew retaliation against her would surely follow.

That is exactly what happened. Retaliation in a variety of forms started a few days later, including unfair public criticism, sabotage of Oleszko's work in a variety of ways including denial of necessary training, removal of job assignments, retaliatory job assignments, preventing completion of work by denying of necessary information and denial of other resources, denying credit and recognition for work done, and denial of a promotion while almost everyone in the department was promoted past her, until Oleszko was finally promoted on July 1, 1996, the day after respondent Howard retired.

When Oleszko was finally promoted, it was from the same civil service eligibility list, from another state agency, that she had been on all along. In fact her rank on that list was the top position, higher than the ranking of most others promoted past her, but she was not promoted until the moment her vindictive supervisor, defendant Howard, retired. The record shows that she had followed correct procedure for obtaining that promotion all along. That correct procedure finally worked as soon as respondent Howard was gone.

An important factor in this treatment of Oleszko is that her department has a very strong bias in favor of persons of Asian descent, causing discrimination against

non-Asians such as Oleszko who is Caucasian. The uncontradicted statistical evidence shows that the odds of the favoritism of Asians in the work force in Oleszko's department at SCIF occurring randomly, without using race as a selection criterion which respondents deny, are *less than one in one hundred billion*. ER #111, 3:18-4:1.

B. Facts Concerning the SCIF Employee Assistance Program

As respondents acknowledge, the SCIF Employee Assistance Program deals with a wide variety of problems including legal and financial issues, not just issues involving psychotherapy. As the Petition for Certiorari shows, these issues include employment discrimination.

The claimed confidentiality of SCIF EAP communications is actually quite limited.

The SCIF EAP's claims of confidentiality are based on a "Memorandum of Understanding" (Supplemental ER #78).

The Memorandum states at Section 9.4(b), "Employees who are to be referred . . . to an Employee Assistance Program Coordinator will be referred by the appropriate management personnel." There is nothing confidential about a program when the employees' supervisor sends them there.

Section 9.4(c) of the Memorandum specifically provides for a variety of management personnel to know about EAP referrals. It says "No manager, supervisor, department director or coordinator shall disclose the nature of the employee's treatment or the reason for the

employee's leave of absence." This provision assumes that those managers will know "the nature of the employee's treatment" pursuant to an EAP referral. That is not confidential treatment.

Under Section 9.4(b) leaves of absence without pay for treatment "may be granted by the department head or designee upon the recommendation of the Employee Assistance Program Coordinator. . . . " When EAP refers an employee to outside treatment the payroll department and the employee's own supervisor can know about it. That is not confidential.

Section 9.4(c) provides that "records concerning an employee's referral and/or treatment shall be kept confidential." That is not even close to the all inclusive absolute confidentiality respondents claim. It excludes from confidentiality, for example, the very employment discrimination information that Oleszko seeks in this case.

RESPONSE TO "REASONS FOR DENYING THE WRIT"

Respondents' reasons for opposing the writ simply ignore fundamental policies that have guided the law of privilege in the federal courts for decades.

A. Confidentiality in Business and Professional Relationships Does Not Require an Evidentiary Privilege in Federal Court

The respondents argue that EAP's are a good thing, and that an assurance of confidentiality to EAP clients

facilitates the useful work of the EAP. That is not disputed. Privacy and confidentiality are undoubtedly useful and beneficial in a vast variety of communications in business and in the professions.

It is a logical error to jump from recognizing the utility of confidentiality as a general matter to concluding that confidential communications are privileged. As the Eighth Circuit explained in *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir. 1997), it is entirely possible, indeed routine and normal, to meaningfully and effectively assure confidentiality, even though there is a possibility that disclosure of the communication may be required in some future unrelated lawsuit. *Carman* held that a company ombudsman, like the SCIF EAP, can maintain confidentiality with its employee clients without the need to create a privilege to protect such communications.

B. The Nature of EAP Communications Are Fundamentally Different from Heretofore Privileged Communications

Professional relationships where privileges have been recognized in the past deal with limited narrow ranges of professional consultations. Doctors, psychotherapists, attorneys and priests deal with a limited range of subject matter which courts have sought to protect from public disclosure even at the cost of thwarting discovery of truth in legal proceedings.

EAP communications are not limited to a particular narrowly defined area of professional consultation. As respondents acknowledge an EAP counselor can deal

with everything from workplace disputes to severe emotional problems. Communications with doctors are not privileged when the communication concerns an employment dispute unrelated to medical care. What the Ninth Circuit has announced here is just such a vast ill-defined absolute privilege. When EAP counselors act as assistants to psychotherapists in the course of psychotherapy, then it is reasonable to protect those communications, but the Ninth Circuit has established a privilege far more absolute, for all EAP communications, than even the attorney-client privilege. This new privilege is too vast and ill defined to justify the unlimited suppression of the truth it will necessarily require.

C. Professional Communication Privileges in the Federal Courts Are Rare

There are a few situations in which the circumstances are so unusual that it is necessary to suppress relevant evidence. These include lawyer-client communications (though even that fundamental privilege is not absolute, see, e.g., the crime-fraud exception of *United States v. Zolin*, 491 U.S. 554, 563 (1989)), psychotherapy, *Jaffee v. Redmond*, 518 U.S. 1 (1996), the privilege against self-incrimination, and state secrets, *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958).

Various other possible privileges, far more compelling than an EAP privilege, have not been recognized by the federal courts, including for example physician-patient. *Gilbreath v. Guadalupe Hosp. Found., Inc.*, 5 F.3d 785, 791 (5th Cir. 1993). Others rejected by this court

include privileges for accountants, for academic peer review, and for debate by state legislators. *Jaffee*, supra, dissent, 518 U.S. at 19.

D. The "Ombudsman Privilege" Rejected in *Carman v. McDonnell Douglas* Is Closer to the Recognized Privileges than the New EAP Privilege

As respondents point out, the professional function of the ombudsman in *Carman v. McDonnell Douglas*, 114 F.3d 790 (8th Cir. 1997) is much more narrow than what an EAP counselor does. The *Carman* ombudsman's job more closely resembles what a lawyer does, that is receive information about disputes and attempt to resolve them. Although the range of the issues dealt with is limited to a category of legal disputes that might otherwise by handled by an attorney, the Eighth Circuit held that the confidentiality promised by the *Carman* ombudsman could be protected without expanding it into an evidentiary privilege. 114 F.3d at 793-794.

Unlike the narrow, lawyer-like function of the *Carman* ombudsman, the SCIF EAP counselors deal with an unlimited and vast variety of problems, so the policies weighing against a privilege, especially when the EAP is not providing psychotherapy, are far more compelling than in the case of the *Carman* ombudsman.

CONCLUSION

In order to justify a new evidentiary privilege the court must find that "permitting a refusal to testify or

excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). Creating a new evidentiary privilege for communications with an EAP counselor, particularly communications concerning employment discrimination and not concerning psychotherapy, fails that test.

Respectfully submitted,

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